INDEX

Page

Citation to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 9

(1) The Decision Below Raises Significant and Recurring Problems Concerning Dismissal for Lack of Jurisdiction of Cases Otherwise Required to be Heard by a Statutory Three-Judge Court under 28 U.S.C. Section 2281. 9

(2) The Decision Below Decided a Question of Texas State Law in Direct Conflict with the Applicable Texas Statutory and Case Law Governing the Subject Matter Jurisdiction of Texas Trial Courts with Respect to Election Contests 10

(3) The Decision Below Conflicts with Prior Decisions of the United States Supreme Court on the Res Judicata Effect of Prior Judgments. 13

(4) The Ultimate Constitutional Issue Presented by this Case is of Great Significance in the Administration of Election Laws in Every Political Subdivision of the State of Texas which Has or Will Seek Financing Through Issuance of General Obligation Bonds. 16

Conclusion 17

Appendix 1 (Opinions and Judgments of the District Courts and the Court of Appeals) 18

Appendix 2 (Statutory and Constitutional Provisions Involved) 36

Appendix 3 (Letter of State Court Judge) 46

TABLE OF AUTHORITIES

Page

Cases:

Carter v. City of Fort Worth, 456 F.2d 572 (5th Cir. . . . 1972) 1

Carter v. City of Fort Worth, (D.C.N.D. Tex. . . . 1971) 5

Carter v. Fort Worth Independent School District, Civ. No. 57283-C, Dist. Ct. of Tarrant County, 141st Judicial Dist. of Texas, June 25, 1969 1

Carter v. Tomlinson, 149 Tex. 7, 227 SW2d 795 at 797 (1950) 10

Clegg v. United States, 112 F.2d 886 at 887 (10th Cir. . . . 1940) 14

Etten v. Lovell Manufacturing Co., 225 F.2d 844 (3rd Cir. . . . 1955), *cert. den.* 350 U.S. (1956) 13

Garza v. Dare, 475 SW2d 340 (Tex. Civ. App. — Corpus Christi 1971, no writ history) 10

Hartmann v. Time, Inc., 166 F.2d 127 (3rd Cir. . . . 1948), *cert. den.* 334 U.S. 838 (1948) 14

Kelsey v. Corbett, 396 SW2d 440 (Tex. Civ. App. — El Paso 1965, ref. n.r.e.), *appeal dismissed,* 385 U.S. 35 11

Killam v. Webb County, 270 SW2d 628 (Tex. Civ. App. — San Antonio 1954, ref. n.r.e.) 11

Lasater v. Middleton, 390 SW2d 8 (Tex. Civ. App. — El Paso 1965, ref. n.r.e.) 11

Lund v. Alanis, 381 SW2d 955 (Tex. Civ. App. — San Antonio 1964, err. dism'd) 11

Montgomery Independent School District v. Martin, 404 SW2d 638 (Tex. Sup. 1971) 16

Moore v. Edna Hospital District, 449 SW2d 508 at 522 (Tex. Civ. App.—Corpus Christi 1969, ref. n.r.e.) 11

Moses Lake Homes v. Grant County, 365 U.S. 744 (1961) 15

Phoenix v. Kolodjiewski, 399 U.S. 212-213 (1970) 16

St. John v. Wisconsin Employment Relations Board, 340 U.S. 411 (1951) 15

TABLE OF AUTHORITIES (Continued)

Page

Slater v. Ellis County Levee Improvement District No. 9, 120 Tex. 272, 36 SW2d 1014 (1931) 10
Smith v. McNeal, 109 U.S. 246 (1882) 13

United States v. Costello, 171 F.Supp. 10 (S.D.N.Y.... 1959), *aff'd* 275 F.2d 335 (2nd Cir.... 1960), *aff'd* 365 U.S. 265 (1961) 13

Wilson v. City of Port LaVaca, 391 U.S. 352 (1968) 9

Statutes, Codes, Constitutions:

Fourteenth Amendment to the United States Constitution 3, 4, 16
Article 6, Section 3, TEX. CONST. (1955) 3
Article 6, Section 3a, TEX. CONST. (1955) 3
Article 5.03, TEXAS ELECTION CODE ANN. (Supp. 1972) 3
Article 5.04, TEXAS ELECTION CODE ANN. (Supp. 1972) 3
Article 5.07, TEXAS ELECTION CODE ANN. (1967) 3
Articles 9.01, 9.03-9.05, 9.07, 9.30, 9.31, TEXAS ELECTION CODE ANN. (1967) 3, 10, 11
Article 717m, TEX. REV. CIV. STAT. ANN. (1964) 12

28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 2281 ..... 2, 3, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No._____

KATHLEEN CARTER, ET AL, *Petitioners*

v.

CITY OF FORT WORTH, ET AL, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 3, 1972.[1]

CITATION TO OPINIONS BELOW

The Order of the three-judge district court remanding the cause to the single district judge is printed in Appendix 1 hereto, *infra*, p. 18. The Order of Dismissal and Memorandum on Motions to Dismiss of the single district judge is unreported and is printed in Appendix 1 hereto, *infra*, p. 19. The opinion of the Court

[1]An exhaustive list of all petitioners is as follows: Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson, and George Armstrong. An exhaustive list of all respondents is as follows: City of Fort Worth, Roy A. Bateman, City Secretary, R. M. Stovall, Mayor, and Crawford Martin, Attorney General of Texas.

of Appeals for the Fifth Circuit, printed in Appendix 1 hereto, *infra*, p. 20, is reported in 456 F.2d 572.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 3, 1972. (Appendix 1, *infra.*) A timely petition for rehearing en banc was denied on April 20, 1972, and this petition for certiorari was filed within 90 days of that date. (Appendix 1, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1

Whether an order of a three-judge court dissolving itself for lack of jurisdiction and an order of dismissal by a single district judge for lack of jurisdiction is a procedurally appropriate disposition of a case otherwise required to be heard by a statutory three-judge court under 28 U.S.C. Section 2281 where such lack of jurisdiction is predicated solely upon a determination that a prior state court case is res judicata of the plaintiffs' claims.

2

Whether a prior state trial court judgment is res judicata of a similar cause of action in federal court brought by the same plaintiffs where the state court held that it had no subject matter jurisdiction of the plaintiffs' claim under the applicable state law.

3

Whether Article 6, Sections 3 and 3a of the Texas Constitution and statutory provisions based thereon, which limit the franchise in bond elections to persons who own taxable property, some of which property has been rendered for taxation, is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved are as follows:

> Art. 6, Section 3, TEX. CONST. (1955); Art. 6, Section 3a, TEX. CONST. (1955); Art. 5.03, TEXAS ELECTION CODE ANN. (Supp. 1972); Art. 5.04, TEXAS ELECTION CODE ANN. (Supp. 1972); Art. 5.07, TEXAS ELECTION CODE ANN. (1967); Art. 9.01, 9.03-9.05, 9.07, 9.30, 9.31, TEXAS ELECTION CODE ANN. (1967); 28 U.S.C. Section 2281.

They are set forth in full in Appendix 2, *infra*, p. 36.

STATEMENT OF THE CASE

Texas election laws limit the right to vote in bond elections to persons who own property which has been rendered for taxation.[2] Petitioners brought the instant case in federal district court to have those laws declared unconstitutional and to enjoin their enforcement on the ground that those laws are in irreconcilable

[2]See Appendix 2 hereto, *infra*, p. 36, for a text of the statutes and constitutional provisions.

conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (R. App. p. 1).[3]

On June 25, 1969, petitioner Kathleen Carter brought a suit, Cause Number 57283-C, in the District Court of Tarrant County, Texas, against the Fort Worth Independent School District, challenging her exclusion from voting in a school bond election held on May 10, 1969. (R. App. p. 250).

On April 20, 1970, petitioners added additional parties, and made the suit a class action. The City of Fort Worth was joined as a party defendant. Petitioners sought a declaratory judgment that the Texas voting laws challenged in the instant suit were unconstitutional, and advanced, as a ground for declaratory relief, that the City of Fort Worth was about to hold a city bond election. (R. App. p. 37).

On June 12, 1970, a hearing was held in that case on Motions for Summary Judgment filed by all parties, and the case was at that time finally submitted to the state court for a decision. (R. App. p. 250).

On July 10, 1970, the office of the Attorney General announced with respect to Texas bond elections that "the policy of this office will be to comply with the laws and Constitution of this state until such time as the *federal judiciary* shall see fit to clearly dispose of them." (Emphasis added). (R. App. p. 134).

---

[3]The certified record in this court has not yet been printed in Appendix form. All references to "R. App., p. ...." are to be printed bound Appendix as it appeared in the Court of Appeals which is contained in the certified record. All other portions of the certified record are identified by the title of the document contained in the certified record.

On August 10, 1970, respondent City of Fort Worth adopted an ordinance calling for a bond election on September 8, 1970, and directing that the election be held as a dual election (R. App. p. 114). The votes of persons whose property had been rendered for taxation were to vote in a separate booth or polling box from the persons who had no property rendered for taxation. Dual balloting had not theretofore been employed by the City of Fort Worth nor had non-property owners previously been permitted to cast a ballot. (R. App. p. 106).

On August 25, 1970, Judge James Wright of the 141st Judicial District Court of Tarrant County, Texas, announced his decision in the state court suit by means of a letter to all parties, which letter read in part: "Under the circumstances, the Court has no justiciable controversy before it and is precluded from rendering an advisory opinion." (Trial Brief; City of Fort Worth, p. 15, and R. App. p. 251).[4]

On August 31, 1970, petitioners, who were the same parties as the plaintiffs in the state court suit, filed this class action in the Federal District Court for the Northern District of Texas, CA-4-1541, seeking an

[4]The text of the letter appears only in the Defendant's City of Fort Worth Trial Brief, which has been made a part of the certified record in this Court. The text of the letter was asserted as a fact by the Defendant City of Fort Worth in that brief and is acknowledged as a true copy of the letter by petitioners. It is thus a part of the evidence in this case. The letter appears on pages 15 and 16 of that brief.

Since that trial brief was certified as a part of the record in this case for the sole purpose of including that letter in the record, a full text of the letter is set forth in Appendix 3, *infra*, p. 46, hereto, for the Court's convenience.

All future references to that portion of the record will be in the form "Trial Brief: City of Fort Worth, p. ___".

injunction to prevent the City of Fort Worth from holding the September 8, 1970 bond election under their announced dual balloting procedure. The respondents in this suit are the City of Fort Worth and the officials thereof, and the Attorney General of Texas who was not a party to the state court suit. (R. App. p. 1).

On September 2, 1970, the 141st Judicial District Court formally entered and signed an order granting Defendants' Motion for Summary Judgment, and denying Plaintiffs' Motion for Summary Judgment in the state court suit. (R. App. p. 88). The plaintiffs gave notice of appeal, but did not perfect that appeal.

On September 8, 1970, the City of Fort Worth held a bond election in which the following propositions were submitted to the electorate:

I	Street Improvements	$ 23,100,000.
II	Fire Protection	750,000.
III	Park and Recreation Improvements	3,450,000.
IV	Aviation Improvements at Municipal Airport	2,000,000.
V	Sanitary, Sewer System and Sewage Disposal	9,500,000.

Items numbered one, two and five passed in the aggregate and passed in each tabulation. The other two items both failed in the aggregate while passing in the non-property owner tabulation. Therefore, the non-property owners who voted did not as a class affect the outcome of the election.

A dual system of balloting was used in which persons who signed affidavits stating they were property owners who had rendered property for taxation voted in one tabulation, while those who did not voted in another. (R. App. pp. 195-200).

All of petitioners except Theresa Ludvigson voted in the September 8, 1970 bond election. (R. App. p. 202).

All of the petitioners were qualified to vote in elections of the City of Fort Worth except that they are unwilling to accept rendition of property of any type for taxation as a condition to the right to vote, or have their vote counted in non-federal elections, or to sign any type of affidavit stating that they are property owners, or that they have rendered property for taxation as a condition to the right to vote, or have their vote counted, in non-federal elections. (R. App. p. 181).

It has been the policy of the Attorney General of Texas since December 19, 1969, to refuse to approve issuance and sale of bonds unless a majority of all persons has voted for the proposition. However, the Attorney General refuses to approve the issuance of bonds if a majority of persons whose property has been rendered for taxation vote against a proposition, even though the same proposition received a majority of the votes cast by the aggregate. (R. App. p. 204).

Thus property owners are in effect given a veto power over the majority in the event the majority of all voters pass a proposition.

Thereafter, on September 14, 1970, the petitioners

(2) THE DECISION BELOW DECIDED A QUESTION OF TEXAS STATE LAW IN DIRECT CONFLICT WITH THE APPLICABLE TEXAS STATUTORY AND CASE LAW GOVERNING THE SUBJECT MATTER JURISDICTION OF TEXAS TRIAL COURTS WITH RESPECT TO ELECTION CONTESTS.

A. *The State Court Had No Jurisdiction Because the State Case Was Not An Election Contest Under Texas State Statutory Law.*

Articles 9.01 through 9.38 of the Texas Election Code provide the "final and exclusive" method of contesting elections in the State of Texas.[5] *Carter v. Tomlinson*, 149 Tex. 7, 227 SW2d 795 at 797 (1950); *Slater v. Ellis County Levee Improvement District No. 9*, 120 Tex. 272, 36 SW2d 1014 (1931). It is undisputed on this record that the petitioners never filed an election contest with respect to the City of Fort Worth election to be held on September 8, 1970.

Garza v. Dare, 475 SW2d 340 (Tex.Civ.App.—Corpus Christi 1971, no writ history) held that Article 9.03 of the Texas Election Code requires 30 day notice of an election contest in writing, including the intention to contest, and the grounds relied upon to sustain the contest, was a mandatory notice. The Court further held that taxpayers were not entitled to contest a revenue bond election where neither the notice of intention to contest the election nor notice of the grounds relied upon to sustain the contest, had been given. It is undisputed on this record that the

[5]See Appendix 2, *infra* p. 42, for a full text of the relevant statutes.

petitioners in this case never gave any type of notice of intention to contest the City of Fort Worth bond election to be held on September 8, 1970, nor any notice of the grounds relied upon to sustain such a contest, had one been filed.

It should also be carefully noted that in Texas no election contest can be filed until after the election is held. Art. 9.01 TEX. ELECTION CODE ANN. (1967).

B. *The State Case Law Holds That No Election Contest Can Be Filed In Advance of An Election.*

Petitioners' only challenge in state court to the September 8, 1970 bond election of the City of Fort Worth was by means of a prayer for declaratory relief in advance of the election and in advance of the ordinance calling the election.

However, the courts of Texas have without exception held that the declaratory judgment device is not available as a method of contesting an election. *Kelsey v. Corbett*, 396 SW2d 440 (Tex. Civ. App. — El Paso 1965, ref. n.r.e.), *appeal dismissed*, 385 U.S. 35; *Lasater v. Middleton*, 390 SW2d 8 (Tex. Civ. App. — El Paso 1965, ref. n.r.e.); *Lund v. Alanis*, 381 SW2d 955 (Tex. Civ. App.—San Antonio 1964, err. dism'd); *Killam v. Webb County*, 270 SW2d 628 (Tex. Civ. App. — San Antonio 1954, ref. n.r.e.).

> Plaintiffs' original petition for 'declaratory judgment and injunctive relief' was addressed to the district court under its general powers, legal and equitable, under which the courts do *not* have jurisdiction of an election contest. *Moore v. Edna Hospital District*, 449 SW2d 508 at 522 (Tex.

> Civ. App.—Corpus Christi 1969, ref. n.r.e) (Emphasis added)

A diligent search had been made by counsel for petitioners for any case in the State of Texas holding that an election contest may be entertained by a Texas trial court before the election is held through use of the declaratory judgment device. Not one such case has been located.

It is respectfully submitted that there is no authority in the law of the State of Texas holding that state district courts acquire subject matter jurisdiction of an election contest filed through the declaratory judgment device *prior* to the holding of the election.[6]

C. *The State Judge Held His Court Lacked Jurisdiction of Petitioners' Claims.*

The August 25, 1970 letter of the state judge setting forth his reasons for granting Respondents' Motion for Summary Judgment in part provided:[7]

> * * * further, there is no showing that a contest was timely filed with regard to such election.
>
> Under the circumstances, the Court has no justiciable controversy before it and is precluded from rendering an advisory opinion. It must be and is presumed that the Fort Worth Independent School District and the City of Fort Worth will

[6]There is one statutory exception to the rule that an election cannot be contested by means of declaratory judgment: Art. 717m TEX. REV. CIV. STAT. ANN. (1964), allowing political subdivisions to seek declaratory relief. This statutory exception confers no rights on private citizens to bring such actions.

[7]The formal judgment, appearing at R. App. pp. 87, 88, states no underlying reasons for the court's decision.

> conduct future elections in full compliance with the Constitution and Laws of the United States and the State of Texas.[8]

This letter leaves no doubt that Judge James Wright of the 141st Judicial District Court thought his court had no jurisdiction of the Appellants' declaratory judgment cause of action with respect to the city bond election of September 8, 1970.

After the discovery by petitioners that the state court had no jurisdiction of the cause of action as to the City of Fort Worth bond election to be held on September 8, 1970, the petitioners were surely free to abandon that cause of action and bring a proper election contest in either state or federal court.

(3) THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT ON THE RES JUDICATA EFFECT OF PRIOR JUDGMENTS.

A judgment denying relief for lack of jurisdiction does not preclude a subsequent suit in a court of competent jurisdiction on the merits of the cause of action which was originally involved. *Smith v. McNeal*, 109 U.S. 426 (1882); *Etten v. Lovell Manufacturing Co.*, 225 F.2d 844 (3rd Cir. . . . 1955), *cert. den.* 350 U.S. 966 (1956); *United States v. Costello*, 171 F.Supp. 10 (S.D.N.Y. . . . 1959), *aff'd* 275 F.2d 335 (2nd Cir. . . . 1960), *aff'd* 365 U.S. 265 (1961).

"Merits" means "the real or substantial grounds of action or defense as distinguished from matters of

[8]See Appendix 3 *infra*, p. 46, for a full text of the letter.

practice, procedure, jurisdiction or form". *Clegg v. United States*, 112 F.2d 886 at 887 (10th Cir. . . . 1940). The clearly stated ground for the sustaining by the state court of Defendants' Motion for Summary Judgment was that the court had no justiciable controversy before it and was precluded from rendering an advisory opinion. The state court further clearly stated that no proper election contest had been filed. (Trial Brief: City of Fort Worth, p. 15). Therefore, this was not a decision on the merits of the controversy.

However, if there be any doubt created by the state judge's reference to the meritorious issues in that letter, that doubt must be resolved in favor of a judgment *not* on the merits, unless the contrary can be shown. *Hartmann v. Time, Inc.*, 166 F.2d 127 (3rd Cir. . . . 1948), *cert. den.* 334 U.S. 838 (1948).

If, as the Court of Appeals stated in its opinion, the petitioners' prayer for injunctive relief from "any other election", the injury from which is "purely speculative at this time and it was purely speculative at the time the federal suit was filed", is insufficient to state a cause of action different from the one in state court, then *a fortiori*, the state court petition as finally amended was insufficient to state a cause of action as to any election to be held by the City of Fort Worth in September of 1970. The state court case was unconditionally submitted for judgment on June 12, 1970, some 59 days prior to the adoption of the ordinance calling the election by the City of Fort Worth. On June 11, 1970, a prayer for relief from such an election would, in the words of the Court of Appeals, have

been asking for relief from harm that was "purely speculative" at that point in time. *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961).

If the state court suit stated no cause of action as to the September 8, 1970 bond election, *then no judgment in that case could possibly be res judicata as to a subsequent suit in federal court as to the September 8, 1970 bond election. St. John v. Wisconsin Employment Relations Board*, 340 U.S. 411 (1951).

If it is assumed for the sake of argument that the state court had such jurisdiction, a judgment in that case could not possibly have afforded the plaintiffs in that case any meaningful relief from the manner in which the September 8, 1970 bond election was in fact held. *After* the state court case was submitted to the state judge for a decision, a completely new and theretofore unannounced policy of employing dual balloting in the holding of bond elections was adopted: *all* otherwise qualified voters were permitted to vote, without respect to property ownership, but their votes were given a different weight from those of property owners.

(4) THE ULTIMATE CONSTITUTIONAL ISSUE PRESENTED BY THIS CASE IS OF GREAT SIGNIFICANCE IN THE ADMINISTRATION OF ELECTON LAWS IN EVERY POLITICAL SUBDIVISION OF THE STATE OF TEXAS WHICH HAS OR WILL SEEK FINANCING THROUGH ISSUANCE OF GENERAL OBLIGATION BONDS.

It is probable that all general obligation bonds voted in Texas since June 23, 1970 are void. On that date, this Court announced its decision in *Phoenix v. Kolodjiewski*, 399 U.S. 204 (1970). This Court there held that a 1969 bond election in which the franchise was reserved to property owners was void. Issuance of those bonds was enjoined.

In that opinion, this Court stated:

> * * * Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. *Phoenix v. Kolodjiewski*, 399 U.S. 212-213 (1970).

Texas is one of those fourteen states.

In the face of the *Phoenix* decision, the Texas Supreme Court has squarely held that the Texas voting scheme challenged in this suit is not violative of the Equal Protection Clause of the Fourteenth Amendment. *Montgomery Independent School District v. Martin*, 404 SW2d 638 (Tex. Sup. 1971).

Since the record in this case is complete and all evidentiary matters have been determined, this Court

has the power to decide this case on the merits of the ultimate constitutional issue presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DON GLADDEN
702 Burk Burnett Building
Fort Worth, Texas
Counsel for Petitioners

July 13, 1972

APPENDIX 1: OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1541

KATHLEEN CARTER, ET AL
VS.
THE CITY OF FORT WORTH, ET AL

ORDER

Upon consideration of the papers and briefs filed in this case and after oral argument by counsel on the question of jurisdiction of this Court, the Court is of the opinion that it is without jurisdiction.

Therefore, the cause of action is remanded to the Honorable Leo Brewster, the District Judge to whom application for relief in this cause was made, for appropriate action. The three-judge Court is dissolved.

/s/ HOMER THORNBERRY
U. S. CIRCUIT JUDGE
/s/ LEO BREWSTER
U. S. DISTRICT JUDGE
/s/ R. HILL
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1541

KATHLEEN CARTER, ET AL
VS.
CITY OF FORT WORTH, ET AL

ORDER OF DISMISSAL

The respective motions for dismissal filed by the defendants herein have been presented in a hearing held after due notice, with the attorneys for each of the parties present and participating. After hearing oral arguments and considering the briefs filed by the parties, the Court is of the opinion that this case should be dismissed for lack of jurisdiction for the reasons given in the memorandum opinion filed simultaneously herewith.

It is therefore ordered that this case be hereby dismissed for lack of jurisdiction and that the costs be taxed against the plaintiffs, jointly and severally.

Signed, June 30, 1971.

/s/ LEO BREWSTER
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1514

KATHLEEN CARTER, ET AL
VS.
CITY OF FORT WORTH, ET AL

MEMORANDUM ON MOTIONS TO DISMISS

The plaintiffs, Kathleen Catrer, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong, brought this action against the City of Fort Worth, its City Secretary (R. A. Bateman) and its Mayor (R. M. Stovall), and the Attorney General of the State of Texas (Crawford Martin) seeking to enjoin a city bond election and the certification of any bonds voted therein. The plaintiffs based their suit upon the claim that the provisions of the Texas Constitution (Art. 6, Secs. 3 and 3(A)) and of the Texas Statutes (Arts. 5.03, 5.04 and 5.07 of the Texas Election Code) under which such election was to be held violated the Equal Protection Clause of the Federal Constitution. The effect of those provisions was to limit the vote in elections on tax-supported[1] bond issues to quailified electors owning property rendered for taxation in the political subdivision proposing the bond issue.

[1]As opposed to revenue bonds to be paid out of income from the project constructed or improved by money derived from the sale of such bonds.

The plaintiffs claim that the Court has jurisdiction under 28 U.S.C.A. 1343(3) and 42 U.S.C.A. 1983.

The bond election in question was a purely local one held for the purpose of determining whether or not the Fort Worth City Council should be authorized to issue the following five types of general obligation tax-supported bonds in the future: Street Improvement, Fire Protection, Park and Recreation, Airport, and Sewage Disposal Plant.

This suit was filed at about 5:00 P.M. on August 31, 1970, and the bond election had theretofore been set by the City Council for September 8, 1970. At a conference held on September 3, 1970, between the author of this memorandum and respective counsel for each of the parties, it was recognized by all present that it was "impossible to assemble a three-judge court and hold a meaningful hearing before the present bond election scheduled on September 8, 1970, as the Attorney General was entitled to five days notice and he has not yet made his appearance herein." See Memorandum Order of September 3, 1970. As shown by that order, the plaintiffs stated that they did not insist on their request for temporary injunction to stop the election itself, as they felt that their claims would not become moot by reason of the election. Their contentions could be pursued under their request that the certification of the bonds be enjoined. With consent of all parties, the order directed that the bond election proceed as scheduled on September 8, 1970. Thereafter, a three-judge court was constituted, and it met in Fort Worth for the purpose of holding a trial of this case. At such hearing, after considering the briefs

and oral arguments, that court held that it had no jurisdiction and remanded the case to the resident judge for appropriate action on the defendants' motions to dismiss.

The basis for the action of the three-judge court was that these plaintiffs had litigated this same issue in Cause No. 57283-C, Kathleen Carter, et al v. Fort Worth Independent School District and the City of Fort Worth, in the District Court of Tarrant County, Texas, 141st Judicial District, Brown v. Chastain, 5 Cir., 416 F. 2d 1012 (1969); Paul v. Dade County, Florida, 5 Cir., 419 F 2d 10 (1969). The defendants' motion to dismiss now before the resident judge for action is predicated upon the same ground.

The plaintiffs in the state court action are the same as the plaintiffs in the case now before this Court. The defendants in the state court suit were the City of Fort Worth and the Fort Worth Independent School District, whereas the City of Fort Worth, two of its officers, and the Attorney General of Texas[2] are defendants in the case here. The reason for the two political subdivision defendants in the state court was that the plaintiffs were challenging an election on a school bond issue as well as one on city bonds. However, the city bond election there involved was the same as the one here. The grounds for attacking the validity of each of the bond elections were the same as those urged in the present case.

On June 12, 1970, the state court held a hearing on

[2]There is no state statute requiring the Attorney General to be made a party to a case of this kind.

the respective motions for summary judgment filed by the plaintiffs, the Fort Worth Independent School District and the City of Fort Worth. At the conclusion of the hearing, the matter was taken under advisement. On August 25, 1970, the state court judge sent the attorneys[3] in that case a letter saying in part:

> "After careful consideration and study, the Court is of the opinion that the Plaintiffs' Motion for Summary Judgment should be, and is hereby overruled, and that the Defendants' Motion for Summary Judgment should be and they are hereby sustained."

Judgment was entered on September 2, 1970, in accordance with such pronouncement. The plaintiffs gave notice of appeal, but later abandoned their appeal after filing the present case in the federal court on August 31, 1970.

The following language from Judge Dyer's opinion in Brown v. Chastain, supra, at p. 1013, is pertinent here:

> "It is obvious from the complaint and the requested relief that the appellants are here attempting to relitigate their federal constitutional claims by obtaining a form of direct federal district court review of the state decisions . . ."
>
> ". . . If the [state court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellant proceeding . . ."
>
> ". . . [F]ederal courts most assuredly do not

[3]The respective attorneys for the plaintiffs and the City of Fort Worth in the state court case were the same as the ones for those litigants in the present case.

> provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts."

The plaintiffs here chose the state court as the forum to litigate the very issue they are now presenting to this Court. After having had their day in court, they want to re-litigate their case here.

Both Brown v. Chastain and Paul v. Dade County, supra, held that, under circumstances similar to those in this suit, the appropriate action was to dismiss the cases for lack of jurisdiction.

An order will be entered dismissing this case for lack of jurisdiction, with the costs taxed against the plaintiffs.

Signed, June 30, 1971,

/s/ LEO BREWSTER
JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2496

KATHLEEN CARTER, ET AL.,
Plaintiffs-Appellants,
versus
CITY OF FORT WORTH, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(March 3, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: Article 6, Section 3, of the Texas Constitution provides that:

> "In all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto."

This State constitutional provision has been implemented by Articles 5.03, 5.04, and 5.07 of the Texas Election Code, providing that only quailified electors

who have duly rendered their property for taxation shall be qualified to vote in such elections and only if the individual offering to vote shall sign and swear to an affidavit that he owns property, describing one item thereof, and that he has duly rendered it for taxation. A false affidavit in this regard is a felony, punishable as such.

In a Texas State Court the plaintiffs brought a class action charging that officials of the City of Fort Worth had announced that a bond issue election would be held during 1970 and that their right to vote as non-property owners in such an election was in imminent dangero f denial because of the foregoing provisions of the Texas Constitution and the Texas Election Code. They asked the state court to declare these constitutional and statutory provisions null and void as in conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Later, a supplemental petition particularly singled out Article 5.04 of the Election Code. Still later, another supplemental petition was filed in the state court by which it was alleged that the City of Fort Worth had officially admitted that the constitutional and statutory provisions would be enforced in any future bond issue election.

On June 20, 1970, the case was submitted to the state court on motions for summary judgment filed by parties on both sides.

On August 25, 1970, the state court addressed a letter to all parties, announcing that the plaintiffs' motion for summary judgment "should be and is here-

by overruled" and that the defendants' motions for summary judgment "should be and they are hereby sustained". Eight days later, September 2, 1970, the state court order was formally entered. No appeal was prosecuted to any Texas appellate court.

On August 10, 1970, the City Council of Fort Worth called a special bond issue election for September 8, 1970, for the purpose of submitting the issuance of general obligation bonds for certain permanent city improvements. The election was held as called, that is, on September 8, 1970. The resident qualified electors who had owned and duly rendered taxable property voted separately from the other resident qualified electors who owned no property. The returns were counted separately and in the aggregate with the result that the bond issue proposals which passed had been approved by both property owners and non-property owners. Propositions which failed had been approved by a majority of the non-property owners but also failed upon a tabulation of the votes of all those voting, including those who owned and did not own property. In other words, the votes cast separately by the non-property owners had no effect on the outcome of the election or the approval or disapproval of any proposed bond issue.

After the state court had announced its decision rejecting plaintiffs' claims, but before the formal order was entered, the plaintiffs in the state court suit repaired to the United States District Court (August 31, 1970) where they filed a class action against the City of Fort Worth, certain of its officials, and the Attorney General of Texas, seeking to have declared un-

constitutional the very same provisions of the Texas Constitution and the Texas Election Code which they had unsuccessfully attacked in the state court suit. They also sought to enjoin the holding of the proposed election on September 8, 1970, or "any other election" [without describing the nature of such elections] in a manner which would suggest that ownership and rendition of property for taxation was a prerequisite to the right to vote or to have one's vote counted, receiving the votes of non-property owners separately, or requiring the affidavits prescribed by statute. Because the provisions herein referred to apply only to bond issue elections and a bond issue election was the subject of the challenge, the language "any other election" has no significance unless it could be said that plaintiffs intended to refer to some unannounced election which might be held at some indefinite time in the future.

The only relief sought in the federal court which had not been sought in the state court that the Attorney General of Texas be directed to certify bond issues on the basis of all votes cast in an election without reference to ownership of property or the execution of affidavits of ownership. It was likewise asked that the Attorney General be enjoined from refusing to certify bond issues on the ground that votes had been cast by non-property owning qualified electors. This would, of course, have been an unavoidable consequence of the holding sought and lost in the state court.

The parties asked for a Three Judge Court but since time limitations made it impossible to convene such a

Court between the date of the petition (August 31) and the date of the election (September 8) an *agreed* order was entered by the initiating Judge allowing the election to proceed as scheduled. Plaintiffs stated that in their opinion holding the election would not moot the case as they could concentrate on the prayer for relief against the Attorney General, enjoining the issurance of the bonds if any were approved. It apparently never occurred to them that the vote of the non-property owners might make no difference in the outcome of the election, as turned out to be the case.

On September 14, 1970, the plaintiffs-appellants filed a supplemental complaint asking that the Attorney General of Texas be temporarily, and upon final hearing, permanently enjoined from certifying the issuance of bonds which were voted in the election of September 8, 1970, or in any other election held by a political subdivision of the State of Texas in which the requirements set forth by the aforementioned provisions of the Texas Constitution and Texas Election Code are observed. This complaint also asked that the City of Fort Worth, its Mayor and City Secretary, be temporarily and upon final hearing permanently enjoined from selling bonds voted in the election of September 8.

This amended complaint overlooked the fact that the votes of the non-property owners had been in favor of the bond issues which were approved by the voters as a whole.

A Three Judge Court was assembled for the purpose of hearing the case on June 4, 1971. That Court, however, was of the opinion that it was without juris-

diction, dissolved itself, and ordered the case remanded to the District Judge before whom the complaint was originally filed. On June 30 the District Judge entered an order again dismissing the case for lack of jurisdiction.

We quote the following from the memorandum opinion of the District Judge:

> "The basis for the action of the three-judge court was that these plaintiffs had litigated the same issue in Cause No. 57283-C, Kathleen Carter, et al v. Fort Worth Independent School District and the City of Fort Worth, in the District Court of Tarrant County, Texas, 141st Judicial District, Brown v. Chastain, 5 Cir., 416 F.2d 1012 (1969); Paul v. Dade County, Florida, 5 Cir., 419 F.2d 10 (1969). The defendants' motion to dismiss now before the resident judge for action is predicated upon the same ground.
>
> "The plaintiffs in the state court action are the same as the plaintiffs in the case now before this Court. The defendants in the state court suit were the City of Fort Worth and the Fort Worth Independent School District, whereas the City of Fort Worth, two of its officers, and the Attorney General of Texas are defendants in the case here. The reason for the two political subdivision defendants in the state court was that the plaintiffs were challenging an election on a school bond issue as well as one on city bonds. However, the city bond election there involved was the same as the one here. The grounds for attacking the validity of each of the bond elections were the same as those urged in the present case.
>
> "On June 12, 1970, the state court held a hearing on the respective motions for summary judgment filed by the plaintiffs, the Fort Worth Independent School District and the City of Fort

Worth. At the conclusion of the hearing, the matter was taken under advisement. On August 25, 1970, the state court judge sent the attorneys in that case a letter saying in part:

> 'After careful consideration and study, the Court is of the opinion that the Plaintiffs' Motion for Summary Judgment should be, and is hereby overruled, and that the Defendants' Motions for Summary Judgment should be and they are hereby sustained.'

"Judgment was entered on September 2, 1970, in accordance with such pronouncement. The plaintiffs gave notice of appeal, but later abandoned their appeal after filing the present case in the federal court on August 31, 1970.

"The following language from Judge Dyer's opinion in Brown v. Chastain, supra, at p. 1013, is pertinent here:

> 'It is obvious from the complaint and the requested relief that the appellants are here attempting to relitigate their federal constitutional claims by obtaining a form of direct federal district court review of the state decisions . . . .
>
> '. . . . If the [state court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding . . . .
>
> '. . . . [F]ederal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.'

"The plaintiffs here chose the state court as the

forum to litigate the very issue they are now presenting to this Court. After having had their day in court, they want to relitigate their case here.

"Both Brown v. Chastain and Paul v. Dade County, supra, held that under circumstances similar to those in this suit, the appropriate action was to dismiss the cases for lack of jurisdiction."

This Court is, of course, well aware of the decision of the Supreme Court of Texas in Montgomery Independent School District v. Martin, 1971, 464 S.W. 2d 638, in which that Court upheld the constitutional and statutory provisions limiting voting rights in school bond issue elections to electors who are property owners and who have rendered their property for taxes. Specifically, the Supreme Court of Texas held that these requirements do not deny equal protection of the law. We are unable to locate any citation which would indicate a petition for certiorari to the Supreme Court of the United States. Of course, these were different litigants, but the present parties plaintiff took no appeal from the decision of the Texas trial court.

We are likewise aware of the decision of the Supreme Court of the United States in *Kramer v. Union Free School District*, 1969, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583, and *Cipriano v. City of Houma*, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647. In this connection, see, also, *Stewart v. Parish School Board of the Parish of St. Charles*, 3-Judge Court, (E.D., La., 1970), 310 F.Supp. 1172, affirmed 400 U. S. 844, 91 S.Ct. 136, 27 L.Ed.2d 129.

The sole issue presently before us is: Whether the

Three Judge Court or the District Court sitting as a single judge had jurisdiction of the case. We do not consider the merits.

Our prior decisions in *Brown v. Chastain, supra,* and *Paul v. Dade County, supra,* are plainly controlling here, as decided by the courts below. The parties were the same, the issues were the same. The plaintiffs lost what they allowed to become a final judgment in the state court and started over again in the federal courts. That is the point to be emphasized here. The present parties are through. That does not foreclose the right of others to file an appropriate action in the federal system if the occasion should arise.

Finally, we must deal with the plaintiffs' contention that their federal action sought injunctive relief from "any other election" to be held under the Texas Constitution and Election Code as written. The plaintiffs say that this aspect of their complaint differentiates it from the complaint filed in Texas state court, and thus that the additional relief requested removes the federal suit from the scope of *Brown v. Chastain* and *Paul v. Dade County, supra.* But the plaintiffs have not alleged that any particular election is now pending or will be pending at any time in the near future. Irreparable injury, an indispensable ingredient of injunctive relief, is purely speculative at this time and it was purely speculative at the time the federal suit was filed, at least as to unspecified future elections. We therefore hold that the portion of the plaintiffs' complaint which looked to "any other election" failed to state a request for injunctive relief that was ripe for constitutional decision, and that the district court

had no jurisdiction to grant relief on that portion of the complaint. For it has long been true that "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action". *Poe v. Ullman*, 1961, 367 U.S. 497, 504, 6 L.Ed.2d 989, 996, 81 S.Ct. 1752.

The judgments dismissing the complaint are

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2496

KATHLEEN CARTER, ET AL.,
Plaintiffs-Appellants,
versus
CITY OF FORT WORTH, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion Mar. 3, 1972, 5 Cir., 1972, ___ F. 2d ___).

(April 20, 1972)

Befor WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX 2: TEXAS STATUTES AND CONSTITUTIONAL PROVISIONS

1. Article 6, section 3, TEX. CONST.

Municipal elections; qualifications of voters. All qualified voters of the State, as herein described, who shall have resided for six months immediately preceding an election, within the limits of any city or corporate town, shall have the right to vote for Mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred, shall be levied upon the persons debarred from voting in relation thereto.

2. Article 6, section 3(a), TEX. CONST.

Bond issues; loans of credit; expenditures; assumption of debts; qualifications of voters. When an election is held by any county, or any number of counties, or any political subdivision of the State, or any political sub-division of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political sub-division, district, city, town or village where such election is held, and who have duly rendered the same for taxa-

tion, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

3. Article 5.03, TEXAS ELECTION CODE (Supp. 1969).[1]

Qualifications for voting for bond issues, lending credit, expending money, or assuming debt. When an election is held by any county, or any number of counties, or any political subdivision of the state, or any political subdivision of a county or any defined district now or hereafter to be described and defined within the state, and which may or may not include towns, villages, or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town, or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Property shall be deemed to have been duly rendered for taxation, for the pupose of determining eligibility to vote in an election as provided in this code and in Article VI, section 3a, of the Texas Constitution, only if the property was rendered to the county, city, district, or other political subdivision holding the elec-

[1]Until September 1, 1969, the following sentence was the final sentence of Article 5.03, TEXAS ELECTION CODE (1967):

"In making up the certified list of owners of taxable property to be used at an election, the tax collector shall include thereon only the names of persons owning taxable property which has been duly rendered for taxation, as herein defined." Effective September 1, 1969, it was dropped from the statute.

tion within the period of time fixed by law for such rendition, or was placed on the tax rolls by the tax assessor prior to the date on which the election was ordered, if the regular rendition period expired before that date.

4. Article 5.04, TEXAS ELECTION CODE (Supp. 1969).[2]

Affidavit of voter in bond election, etc. (a) Before any person is allowed to vote in an election for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, he shall sign and swear to an affidavit to the effect that he owns property, giving a description of one item, which has been duly rendered for taxation to the political subdivision holding the election at a time and in a manner which entitles him to vote in the election, as provided in Section 35 (Article 5.03) of this code. The voter's registration certificate number shall be shown on the affidavit, and it shall contain a statement that the affiant understands that the giving of false information in the affidavit is a felony punishable by

[2]Until September 1, 1969, the text of Article 5.04 TEXAS ELECTION CODE (1967) read as follows:

"*Certified list of taxpayers.* Whenever an election is called in the State of Texas or any political subdivision thereof or in any defined district for the purpose of authorizing the issuance of bonds which place a lien upon real estate, it shall be the duty of the tax collector of the county or political subdivision or defined district to furnish to the election judges a certified list of the owners of taxable property in said county or political subdivision of the State in which said election is to be held who have rendered the same for taxes as shown on the tax rolls; said list of property owners shall determine the qualification of the electors to participate in said election."

On September 1, 1969, the text in the body of the Appendix became effective.

a fine not to exceed $5,000 or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.

(b) The secretary of state shall prescribe the form of the affidavit, and may prescribe instructions to accompany the affidavit. A form for multiple signatures of voters may be used for voting at regular polling places and for absentee voting by personal appearance where the absentee ballots are cast on a voting machine or are counted by a special canvassing board.

Each person voting an absentee ballot by mail or voting by personal appearance in elections where the ballots are to be sent to regular polling places for counting shall be furnished an individual affidavit form, which shall be signed and sworn to at the time the voter marks his ballot. After the voter seals the ballot envelope, he shall place the affidavit into the carrier envelope along with the ballot envelope and the ballot stub. The election officers shall ascertain that the affidavit is properly executed before opening the ballot envelope, and if it is not properly executed, the ballot shall be rejected.

Voters voting at regular polling places or voting absentee by personal appearance shall swear to the affidavit before an officer of the election, and all clerks and deputy clerks for absentee voting and all election judges and clerks at regular polling places shall have authority to administer the oath required of the voter.

(c) The description of a specific item of property

which is required on the affidavit shall be sufficient as to personal property if it identifies the property by a general statement of its nature, as, for example, household furniture, automobile, livestock, jewelry, stock of merchandise, corporate securities, etc. For real property, a description of the property by abstract, survey, patent, subdivision, block, lot, or other legal description shall not be necessary. If the real property is located in an unincorporated town or village, it shall be sufficient to identify the property by general description as so located, as, for example, "house and lot in the town of ....." It shall be sufficient to describe a farm, ranch, or other rural property by a statement of its location with reference to a town, community, or other well-known landmark, as, for example, "farm near ....." Upon request of the voter, the election officer attending him shall inform him as to what will be sufficient description on the affidavit for the specific item of property which he wishes to list.

(d) The ballot of a voter who has been accepted by the election officer as eligible to vote at the election shall never be declared void for any defect or insufficiency in the affidavit or for any misstatement as to property ascerted to have been rendered, if the voter in fact is the owner of any property which has been duly rendered for taxation to the subdivision holding the election.

(e) After voting is concluded, an officer of the election shall place all the affidavits in an envelope or other container which shall be securely fastened and

marked as to identify its contents, and the presiding judge shall deliver the affidavits to the officer having custody of the ballots voted at the election at the same time that he delivers the returns, and the affidavits shall be preserved by such officer under the same regulations applicable to preservation of ballots. The affidavits shall be open to public inspection, but the inspection must be in the presence of the custodial officer or a duly authorized deputy.

(f) A person who knowingly gives false information or makes any false statement in the affidavit required by this section is guilty of a felony punishable by a fine not to exceed five thousand dollars or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.

5. Article 5.07, TEXAS ELECTION CODE (1967).

To vote in city elections. All qualified electors of this State, as described in the two preceding Sections (Arts. 5.05, 5.06) who shall have resided for six (6) months immediately preceding an election within the limits of any city or incorporated town shall have a right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money or assumption of debt, or issuance of bonds, only those shall be qualified to vote who own taxable property in the city or town where such election is held and who have duly rendered the same for taxation; and all electors shall vote in the election precinct of their residence.

TEXAS ELECTION CODE STATUTES:

Art. 9.01

The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature.

The venue of suits or contests between candidates for any office to be filled by the choice of voters of the entire state shall be in Travis County. The venue of suits or contests between candidates for any justice of any Court of Civil Appeals shall be in the county where said Court of Civil appeals has its sittings.

The venue in all other election contests between candidates shall be in the county where the candidate receiving the certificate of election resides. If there is but one district court in the county in which venue is placed by this law and the judge of said court is disqualified to hear any contest, said judge shall be replaced for purposes of said contest in the manner provided by law for civil suits.

Nothing herein shall be construed to prohibit the district court in the county where any such contest may be filed from changing the venue to some adjacent county, upon showing of adequate cause. Acts 1951, 52nd Leg., p. 1097, ch 492, art. 129.

Art. 9.03

Any person intending to contest the election of any one holding a certificate of election for any office mentioned in this law, shall, within thirty (30) days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the "return day" is meant the day on which the votes cast in said election are counted and the official result thereof declared. Acts 1951, 52nd Leg., p. 1097 ch. 492, art. 131.

Art. 9.04

The person holding such certificate shall, within ten (10) days after receiving such notice and statement, deliver, or cause to be delivered, to said contestant, his agent or attorney, a reply thereto in writing. Acts 1951 52nd Leg., p. 1097, ch. 492, art. 132.

Art. 9.05

The notice statement and reply required by the two preceding articles may and shall be served by any person compentent to testify, and shall be served by delivering the same to the party for whom they are intended in person, if he can be found in the county, if not found, then upon the agent or attorney of such person, or by leaving the same with some person over the age of sixteen (16) years at the usual place of abode or business of such person. Acts 1951, 52nd Leg., p. 1097 ch. 492, art. 133.

Art. 9.07

When the notice, statement and reply have been

filed with the clerk of the court, he shall docket the same as in other causes, and the said contest shall have precedence over all other causes. If the office contested for be that of district clerk, then a clerk pro tem shall be appointed as is provided by law in suits where the clerk is a party to the suit. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 135.

Art. 9.30

If the contest be for the validity of an election held for any other purpose than the election of an officer or officers in any county or part of a county or precinct of a county, or in any incorporated city, town, or village, any resident of such county, precinct, city, town, or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as applicable, as are prescribed in this chapter (art. 9.01-9.38) for contesting the validity of an election for a county office. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 158.

Art. 9.31

In any case provided for in the preceding Section (art. 9.30), the county attorney of the county, or if there is no county attorney, the district attorney of the district, or the mayor of the city, town or village, or the officer who declared the official result of said election, or one of them, as the case may be, shall be made the contestee, and shall be served with notice and statement, and shall file his reply thereto as in the case of a contest for office; but in no case shall the

costs of such contest be adjudged against such contestee, or against the county, city, town, or village which they may represent, nor shall such contestee be required to give bond upon an appeal. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 159.

APPENDIX 3: LETTER OF STATE COURT JUDGE

On August 25, 1970, Judge James E. Wright of the 141st Judicial District Court of Texas informed counsel in the State Court case that he would sustain the motion for summary judgment of defendant, City of Fort Worth. The letter stated:

"Gentlemen:

After careful consideration and study, the Court is of the opinion that Plaintiffs' Motion for Summary Judgment should be, and is hereby overruled, and that the Defendants' Motions for Summary Judgment should be and they are hereby sustained.

The Court's decision is based, inter alia, on the following considerations: Except for Plaintiff Carter, no party has been denied the right to vote in an election held by the Fort Worth Independent School District or the City of Fort Worth. The denial of Plaintiff Carter's vote in the school district election of May 10, 1969 was due to her own misinterpretation of the law; further, there is no showing that a contest was timely filed with regard to such election.

Under the circumstances, the Court has no justiciable controversy before it and is precluded from rendering an advisory opinion. It must be and is presumed that the Fort Worth Independent School District and the City of Fort Worth will conduct future elections in full compliance with the Constitution and Laws of the United States and the State of Texas.

The Phoenix case relied upon by the capable at-

torney for Plaintiffs is not, by its own limiting terms, controlling here. There the Court said '. . . the question now presented for decision: Does the Federal Constitution permit a state to restrict to *real property taxpayers* the vote in elections to approve the issuance of general obligation bonds?' (emphasis ours) The Constitution and Laws of the State of Texas impose no such restriction." Pages 15 and 16 TRIAL BRIEF: CITY OF FORT WORTH.

E COPY

Supreme Court, U. S.
FILED
AUG 2 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners*

vs.

CITY OF FORT WORTH ET AL., *Respondents*

Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, in Opposition to Petition for Writ of Certiorari

---

S. G. JOHNDROE, JR.
City Attorney
Attorney for Respondents, City of Fort Worth Et Al.
1000 Throckmorton Street
Fort Worth, Texas 76102

TABLE OF CONTENTS

	Page
JURISDICTION	1–3
QUESTIONS PRESENTED	4–7
STATEMENT OF THE CASE	7–15
REASONS FOR REFUSING TO GRANT THE WRIT	15–26
CONCLUSION	26
CERTIFICATE OF SERVICE	27
APPENDIX "A"	28–30
APPENDIX "B"	31–33

AUTHORITIES

CASES:

	Page
Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947)	15
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936)	3
Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971)	22
Brown v. Chastain, 416 F.2d 1012 (5th Cir., 1969), cert. den., 397 U.S. 951	3, 16, 17-19
Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971)	22
Canales v. Salinas, 288 S.W.2d 207 (Tex.Civ.App., 1956, err. dism.)	6
Chaffee v. Johnson, 229 F.Supp. 445 (S.D.Miss., 1964), affd., 352 F.2d 514 (5th Cir., 1965), cert. den., 384 U.S. 956	21
Dyson v. Stein, 401 U.S. 200, 91 S.Ct.769, 27 L.Ed.2d 781 (1971)	22
Ex parte Godeke, 355 S.W.2d 701 (Tex., 1962)	6
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943)	3, 16

AUTHORITIES (Continued)

Page

Hall v. Beals, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) 21

McCart v. Cain, 416 S.W.2d 463 (Tex.Civ.App., 1967, n.r.e.) 22

Milne v. Deen, 121 U.S. 525, 7 S.Ct. 1004, 30 L.Ed. 980 (1887) 15

Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911) 3

Paul v. Dade County, Florida, 419 F.2d 10 (5th Cir., 1969), cert. den., 397 U.S. 1065 ..... 3, 16, 19

Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) 22-25

Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) 3

Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) 3, 16, 22

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) 22

RULES, CODES AND STATUTES:

Texas Rules of Civil Procedure
Rule 306a 6
Rule 329b 6, 20

Federal Rules of Civil Procedure Rule 23 20

United States Code Annotated 28 U.S.C., § 2283 23

Revised Civil Statutes of Texas Art. 2524-1 21-22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners*

vs.

CITY OF FORT WORTH ET AL., *Respondents*

Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, in Opposition to Petition for Writ of Certiorari

JURISDICTION

No substantial federal question compelling review is presented in this case, and therefore no jurisdiction exists to review the well-considered decision of the United States Court of Appeals for the Fifth Circuit.

This is not a case involving any violation of the Equal Protection Clause of the Fourteenth Amendment, but is plainly and simply a classic example of a res judicata case, under the admitted facts of which these same Petitioners had instituted the same declaratory judgment suit against the same Respondents in a State Court before filing this suit in the Federal Court.

After the State Court had held the hearing on June 12, 1970, on Petitioners', as well as Respon-

dents', Motions for Summary Judgment and thereafter informally indicated on August 25, 1970, that it would grant Respondents' Motion, Petitioners proceeded to turn their backs on the State Court system which declined to rule in their favor and on August 31, 1970, instituted this suit in the United States District Court for the Northern District of Texas, which suit, for all practical purposes, was a carbon copy of their suit still in the process of adjudication in the State Court.

Judgment adverse to Petitioners on the same identical issues was thereafter rendered in the State Court on September 2, 1970. Petitioners gave notice of appeal from such adverse judgment to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth but later abandoned their State Court appeal after filing this suit in the Federal Court.

Even a cursory examination of the record reveals that the Petitioners' legal claims in the Federal Court were identical to their claims pending in the State Court case and that Petitioners were attempting to relitigate the same claims and issues on the merits in the Federal Court that they had unsuccessfully presented in their State Court case. The decision of the Court of Appeals for the Fifth Circuit affirming the judgments of the Three-Judge Court and the District Court dismissing the complaint for want of jurisdiction without passing on the merits was in all things proper and consistent with the national policy forbidding federal courts to stay, enjoin or interfere with

state court proceedings which afford petitioners every opportunity to raise and dispose of their constitutional claims. It is obvious that if jurisdiction was assumed by the Three-Judge Court, such assumption of jurisdiction would have violated such policy and had the effect of enjoining the trial and appellate proceedings in the State Court. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Further, the assumption of jurisdiction by this Court would merely constitute an extension of the judicial power to determine abstract questions. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911); *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

The uncontroverted record clearly and positively demonstrates that the appealable State Court judgment was res judicata of Petitioners' Federal Court case. *Brown v. Chastain*, 416 F.2d 1012 (5th Cir., 1969), cert. den., 397 U.S. 951; *Paul v. Dade County, Florida*, 419 F.2d 10 (5th Cir., 1969), cert. den., 397 U.S. 1065.

QUESTIONS PRESENTED

None of the abstract questions presented for review by Petitioners have any bearing on the material facts of record in this case.

The predicate for the order of the Three-Judge Court dissolving itself for lack of jurisdiction was properly raised and carried forward by these Respondents in their Motion to Dismiss and in Opposition to the Appointment of a Three-Judge Court filed herein on September 3, 1970 (R., pp. 6-10), as well as in their Motion for Judgment on the Pleadings Dismissing the Complaint and Original Answer (R., pp. 16-123). By Memorandum Order signed September 3, 1970, the Resident Judge referred thereto as follows:

> "6. The defendants, City of Fort Worth, Bateman and Stovall, have filed a motion to dismiss and in opposition to the appointment of a three-judge court. Action on that motion will be held in abeyance until it is determined whether a three-judge court should be convened and, if so, whether such court should pass on the motion." (R., pp. 12-13)

The fact of res judicata was conclusively demonstrated by Respondents' exhibits marked Defendant City Exhibit "A" through Defendant City Exhibit "H", inclusive, referred to in Paragraph 4 (R., pp. 17-20) of the Motion for Judgment on the Pleadings Dismissing the Complaint and Original Answer and contained in the Record (Appendix) at pages 37-88. Such exhibits include Petitioners' pleadings and af-

fidavits and motion for summary judgment filed in the District Court of Tarrant County, Texas, 141st Judicial District, in Cause No. 57283-C, as well as the pleadings, answers and motions therein of these Respondents.

There is abundant support in the record for the dissolution of the Three-Judge Court remanding the case to the District Court Judge and the order of dismissal of Judge Brewster and the subsequent affirmance of such judgments dismissing the complaint by the Court of Appeals.

Petitioners' Motion for Summary Judgment in the State Court case, which motion was overruled by Judgment rendered and signed September 2, 1970, alleged in part:

> "That there is no genuine issue as to any material fact and that plaintiffs are as a matter of law entitled to judgment herein **for the reason that the state constitutional and statutory provisions complained of by plaintiffs are in conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment** to the Constitution of the United States of America." (Emphasis supplied) (R., p. 46)

Judgment of the State Court rendered and signed on the 2nd day of September, 1970, found that the Respondent City of Fort Worth was "entitled to judgment as a matter of law and that the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong,

should be and the same is hereby overruled." (R., p. 88)

Notice of appeal by these same Petitioners was also recited in said Judgment as follows:

> "To all of which action on the part of the Court the plaintiffs then and there, in open court, duly excepted and objected and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.
>
> "RENDERED AND SIGNED this the 2nd day of September, 1970." (R., p. 88)

Petitioners would attempt to mislead this Court into concluding that the State Court Judge's letter of August 25, 1970, is, in fact, a judgment. Under Rules 306a and 329b of the Texas Rules of Civil Procedure, a judgment cannot be rendered by letter from a judge and a judgment must be pronounced in open court and reduced to writing in proper form and manner for filing in the Minutes of the Court. *Canales v. Salinas*, 288 S.W.2d 207 (Tex.Civ.App., 1956, err. dism.); *Ex parte Godeke*, 355 S.W.2d 701 (Tex., 1962). The judgment rendered and signed on September 2, 1970, by the State Court Judge overruling Petitioners' State Court motion for summary judgment, and from which these same Petitioners gave notice of appeal, is the formal appealable order, judgment and decree which became final under Rule 329b of the Texas Rules of Civil Procedure on October 2, 1970.[1]

---

[1]See Appendix "A" hereto, *post*, p. 28, for copy of State Court Judgment.

Thus on the factual record in this case, the only question presented for review can be the following:

> Was the decision of the Court of Appeals correct in holding that:
>
> "Our prior decisions in *Brown v. Chastain, supra,* and *Paul v. Dade County, supra,* are plainly controlling here, as decided by the courts below. **The parties were the same, the issues were the same. The plaintiffs lost what they allowed to become a final judgment in the state court and started over again in the federal courts."?** (Emphasis supplied)

STATEMENT OF THE CASE

The statement of the case contained in the Petition is neither complete nor correct. In lieu thereof and for the convenience of the Court, these Respondents would set out in chronological sequence the material facts:

On June 25, 1969, Petitioner Kathleen Carter brought a suit designated as Cause No. 57283-C in the 141st Judicial District Court of Tarrant County, Texas, against the Fort Worth Independent School District, and thereafter, on April 28, 1970, Plaintiffs' First Amended Original Petition was filed, adding the remaining Petitioners as parties plaintiff, bringing the suit as a class action, joining the City of Fort Worth as a party defendant, and praying, among other things, "that citation issue to the defendants, a copy to be served on the Attorney General of Texas ***."

In Paragraph 7 of Plaintiffs' First Amended Orig-

inal Petition filed in the State District Court (Defendant City Exhibit "A", R., p. 40), the same plaintiffs who are petitioners herein alleged as follows:

"7.

"That since the filing of this suit, defendant City of Fort Worth by and through its duly elected officials have publicly announced that a bond election shall be called within the calendar year 1970 to obtain funds for financing the following governmental projects (the amount of the proposed bonds follows the proposed governmental project):

Street Improvements	$23,000,000.00
Fire Protection	750,000.00
Park and Recreation Improvements	3,000,000.00
Aviation Improvements at Municipal Airport	2,000,000.00
Library Improvements	7,900,000.00

That in addition to these general obligation bonds an additional $9,500,000.00 is proposed to be issued as general obligation bonds but to be paid from revenues received from the sale of water and sewage services to the residents of the City of Fort Worth and adjoining communities.

"That plaintiffs are in imminent danger of being denied the right to vote in elections involving the issuance of bonds, lending of credit, expending of money, or assuming any debt because of the provisions of Article 6, sections 3 and 3(a) of the Texas Constitution, and because of the provisions of Articles 5.03 and 5.07 of the Texas Election Code. That plaintiffs' right to vote in the pending city elections and in future elections

involving the issuance of bonds, lending of credit, expending of money, or assuming any debt is in serious jeopardy on account of these four provisions, and their application by defendants. Plaintiffs say that excluding them from participation in these elections denies them equal protection of the law and that their exclusion is not necessary to promote a compelling state interest; that in fact there is no reasonable basis at all for the existence of the limitation or restriction of suffrage imposed by the state constitution and statutes referred to herein."

In Paragraph 8 of Plaintiffs' First Amended Original Petition (R., pp. 40-41), these same Petitioners alleged in the State Court suit in part as follows:

"8.

"That Article 6, sections 3 and 3(a) of the Texas Constitution and Articles 5.03 and 5.07 of the Texas Election Code tend to prevent or chill the free exercise by plaintiffs and their class of the right to vote freely in elections involving the issuance of bonds, lending of credit, expending of money, or assuming any debt.

* * *

"That the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not allow wealth of any kind or degree to be a condition requisite to the right to vote. That the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States does not permit the requirement of rendition for taxation of wealth in any form as a condition to the right to vote. That the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United

States does not permit the requirement of proof of wealth of any kind or degree to be a condition to the right to vote."

In the prayer in the State Court (R., pp. 41-42), Petitioners herein prayed for relief as follows:

"***that citation issue to the defendants, **a copy to be served on the Attorney General of Texas**; and **upon final hearing that the Court** construe the above statutes and constitutional provisions, and **declare that** insofar as such statutes and constitutional provisions make ownership of property in any form a requirement for the right to vote, that **such statutes and constitutional provisions are in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and are therefore unconstitutional**; declaring that insofar as such statutes and constitutional provisions make rendition of any type of property for taxation a condition to the right to vote, that such statutes and constitutional provisions are in conflict with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and are therefore unconstitutional; declaring that insofar as the state of Texas or any subdivision thereof may attempt to require proof of ownership of property of any kind as a requirement to the right to vote, that such action is in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; declaring that insofar as the State of Texas or any subdivision thereof may attempt to require proof of rendition of property of any kind as a requirement to vote, that such action is in conflict with the Equal

Protection Clause of the Fourteenth Amendment of the Constitution of the United States and is therefore unconstitutional; and declaring that insofar as the state of Texas or any subdivision thereof may attempt in any manner to base the right to vote upon ownership of property of any kind, that such action is in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional; and for such other and further relief as they may show themselves entitled." (Emphasis supplied)

On April 29, 1970, Petitioners also filed their First Supplemental Petition in their State Court case, complaining that:

"***the affidavit required by Article 5.04 of the Election Code of the Revised Civil Statutes of Texas is subject to the same constitutional infirmities as Articles 5.03 and 5.07 of the Election Code, and as Article 6, sections 3 and 3(a) of the Texas Constitution." (R., p. 43)

On June 10, 1970, the Petitioners filed their Second Supplemental Petition in their State Court case, alleging in Paragraph 4 thereof:

"That defendant City of Fort Worth has admitted in the affidavit of its City Secretary, Roy A. Bateman, that in bond elections otherwise qualified voters will be required to sign an affidavit to the effect that they have rendered for taxation taxable property in the City of Fort Worth or that they have property on the tax rolls." (R., p. 45)

Petitioners also pleaded therein that such requirement was directly in violation of the Equal Protection Clause of the Fourteenth Amendment and "that, therefore, the plaintiffs are in imminent danger of being harmed by the defendant City of Fort Worth."

These same Petitioners had also filed in their State Court case a motion for summary judgment, in which they alleged:

> "That there is no genuine issue as to any material fact and that plaintiffs are as a matter of law entitled to judgment herein for the reason **that the state constitutional and statutory provisions complained of by plaintiffs are in conflict with the Due Process and Equal Protection Clauses of the Fourteenth Amendment** to the Constitution of the United States of America." (Emphasis supplied) (R. p. 46)

The City of Fort Worth also filed a motion for summary judgment, and on June 12, 1970, as stated by Petitioners, a hearing was held on such motions, and the case was submitted to the State Court for decision. (Judgment, R., p. 87; Appendix "A" hereto)

All of the evidentiary facts necessary to a decision of the case in the Federal Court on the matter of res judicata were admitted and stipulated and appear in documentary exhibits identified by stipulation and are included or referred to in the Pre-Trial Order of the Resident Judge. (R., pp. 176-209) It was stipulated that on August 10, 1970, the City Council of the City of Fort Worth adopted Ordinance No. 6346 (Defendant City Exhibit "J", R., pp. 95-114), the ordi-

nance calling the bond election held thereafter on September 8, 1970.

On August 31, 1970, Petitioners filed their Complaint in the United States District Court for the Northern District of Texas, which date of filing was prior to the rendition and signing of the Judgment of the District Court of Tarrant County, Texas, 141st Judicial District, on September 2, 1970.

On September 3, 1970, the Resident Judge held a conference with the respective attorneys for the parties (except the Attorney General of the State of Texas), after which conference Judge Brewster signed his Memorandum Order,[2] which order correctly contained certain findings, among which were the following:

> "2. Prior to the time this suit was filed, the plaintiffs hereto filed a suit in the 141st District Court of Tarrant County, Texas, Cause No. 57283-C, Kathleen Carter, et al. vs. City of Fort Worth, et al., attacking the constitutionality of the same statutes which are challenged in the present action and seeking declaratory judgment for substantially the same relief as they asked for in the present case. Judgment in that suit was entered by the District Court on September 2, 1970, adversely to the plaintiffs, and an appeal has been taken from such judgment.
>
> * * *
>
> "5. Plaintiffs have expressed that they do not desire to delay the holding of the pending election, **but merely seek to insure by the filing**

[2]See Appendix "B" hereto, p. 31, for copy of Judge Brewster's Memorandum Order dated Sept. 3, 1970.

> **of this suit their constitutional rights to meaningful(ly) participate** in the election." (Emphasis supplied) (R., pp. 11-12)

Thereafter, on September 8, 1970, the bond election was held and five out of the six Petitioners actually voted in the bond election (Stipulation (j), R., p. 202), which admitted fact persuasively and conclusively demonstrates that the manner of the holding of the election by the City of Fort Worth did not prevent, "chill" or deter anyone, including the sixth Petitioner, from voting in such election. (Defendants' Exhibits "B-1", "B-2", "B-3", "B-4", "B-5" and Affidavit of Roy A. Bateman, R., pp. 162-168) Further, under no conceivable class-action theory did Petitioners have any "class," since, as found by the Court of Appeals:

> "***It apparently never occurred to them that the vote of the non-property owners might make no difference in the outcome of the election, as turned out to be the case."

The fact that Petitioners wilfully and intentionally failed to perfect their appeal from the judgment of the State Court makes indelibly apparent their posture and attitude of turning their backs on a State Court system which failed to rule in their favor, obviously hoping for better luck elsewhere. In his letter of November 21, 1970, the same attorney of record for Petitioners in the State Court advised Resident Judge Brewster of the finality of the judgment in the State Court case and that Petitioners had elected "not to appeal their suit for declaratory judg-

ment in the State Court" but to "seek relief exclusively in the United States District Court." (R., pp. 140-141)

REASONS FOR REFUSING TO GRANT THE WRIT

The reasons for refusing to grant the writ are manifest in the opinion of the Court of Appeals and may also be summarized as follows:

1. The decision of the Court of Appeals is not in conflict with any decision of another Court of Appeals.

2. No important question of federal law exists to be settled — The law is well settled in this case by prior decisions of this Court, and more particularly *Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947), and *Milne v. Deen*, 121 U.S. 525, 7 S.Ct. 1004, 30 L.Ed. 980 (1887). In *Angel v. Bullington*, this Court presented an authoritative and lucid discussion of the doctrine of res judicata and held that for res judicata to apply, it is not even necessary that the State Court has passed on the merits and embraced all ultimate substantive issues, and further that res judicata applies even where the judgment of the State Court may be erroneous. In so holding, this Court said:

> "***It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State."

3. No conflict exists between the decision of the Court of Appeals and applicable decisions of this Court relative to the policy and reluctance of Federal Courts to interfere with, stay or enjoin pending State proceedings. *Great Lakes Dredge & Dock Co. v. Huffman*, supra, and *Samuels v. Mackell*, supra.

4. The Court of Appeals has correctly applied and reaffirmed the principles announced in *Brown v. Chastain*, supra, and *Paul v. Dade County, Florida*, supra, on both of which cases this Court placed its stamp of approval by denying certiorari.

5. The decision of the Court of Appeals is consistent with prior decisions of this Court and other Courts of Appeals, and there is no departure from the accepted and usual course of judicial proceedings present. Thus, no necessity exists to call for an exercise of this Court's power of supervision.

6. The decision of the Court of Appeals in applying the doctrine of res judicata to the case at bar was particularly appropriate since the State Court case was identical to the Federal Court case; the State Court case commenced long prior to the filing of the suit in the Federal Court; both cases involved the same parties plaintiff; the City of Fort Worth is named as a defendant in both cases; both cases involved Petitioners' objection to the rendition of property for taxation as a qualification for voting in a general obligation tax bond election; plaintiffs in both suits objected to any requirement that they sign affidavits reciting ownership and rendition of property for taxation as a voting qualification; Article 6, Sections 3 and 3(a), of the Constitu-

> tion of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code are challenged in both cases on the grounds that they are in conflict with the Fourteenth Amendment as it pertains to equal protection of the law; both suits sought a declaratory judgment; the respective attorneys for the parties in both suits are the same; at the time the Federal suit was filed, the State Court case was still in the process of adjudication; in the State Court judgment rendered and signed on September 2, 1970, Petitioners gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth; and the same identical issues and matters in the process of adjudication and adjudicated in the State tribunal were attempted to be relitigated by Petitioners in the Federal Court.

Obviously, the decision of the Court of Appeals affirming the action of the Three-Judge Court in abstaining from asserting jurisdiction and that of the United States District Court in dismissing the cause for want of jurisdiction was in all things proper.

Historically this Honorable Court has not concerned itself with cases of the nature of the case at bar. In this connection in *Brown v. Chastain*, supra, by denying certiorari this Court placed its stamp of approval on a decision by the Court of Appeals for the Fifth Circuit, holding in part as follows:

> **"It is obvious from the complaint and the requested relief that the appellants are here attempting to relitigate their federal constitutional claims by obtaining a form of direct federal district court review of the state decisions,** since

independent equitable proceedings to prevent the enforcement of a judgment are considered a direct attack upon it. See Restatement, Judgments § 11, comment *a* (1942). The District Court was patently without jurisdiction to engage in such a review. As noted in Rooker v. Fidelity Trust Co., 1923, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362:

> If the constitutional questions stated in the . . . [complaint] actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. **If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding.** Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [Citations omitted] Under the legislation of Congress, no court of the United States other than this [the Supreme] Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [Citations omitted] To do so would be an exercise of the appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. * * * Id., at 415-416, 44 S.Ct. at 150.

"As stated in Pilkinton v. Pilkinton, 8 Cir. 1968, 389 F.2d 32, '[i]t is plainly evident that what appellant seeks in this original action is a review by the federal courts of the proceedings of the . . . [Florida] State Courts in the divorce action. Federal courts are without authority to function as an appellate arm of the state courts.' Id. at 33. The decision of a federal constitutional

question by a state court does not warrant a mandatory injunction in the nature of mandamus nor an order striking its decision even if erroneous. 'State courts are competent to decide questions arising under the federal constitution, and **federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts.'** " (Emphasis supplied)

To the same effect was the decision of the Court of Appeals for the Fifth Circuit in *Paul v. Dade County, Florida*, supra (cert. den.), wherein it was held:

"The record in the state case reveals that Nishan Paul, individually, sued Dade County, acting through its named Board of County Commissioners. In the instant case, Irma Feder joined Paul as a plaintiff and they named Dade County, acting through its named Board of County Commissioners, and the County Manager as defendants. Neither the addition of Irma Feder as a plaintiff nor that of the County Manager as a defendant can confer jurisdiction if it would otherwise be lacking. *See* Rooker v. Fidelity Trust Company, 1923, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362, *cf.* Hanna v. Home Insurance Company, 5 Cir. 1960, 281 F.2d 298, cert. denied, 365 U.S. 838, 81 S.Ct. 751, 5 L.Ed.2d 747.

* * *

"It is thus clear that the constitutional issues sought to be raised here were raised and determined in the prior state action. Accordingly, the District Court lacks jurisdiction to reconsider them under our holding in Brown v. Chastain, supra." (Emphasis supplied)

The fact that judgment was rendered and signed in the State Court after Petitioners' complaint was filed herein does not inhibit the application of res judicata based on the State Court judgment. As admitted by Petitioners, the State Court judgment did not become final until October 2, 1970 under Rule 329b of the Texas Rules of Civil Procedure.

The record in this case conclusively demonstrates that for all substantive purposes the suit instituted by the Petitioners in the United States District Court is identical to their suit in the State Court, wherein judgment adverse to them on the same identical issues was rendered and from which they abandoned pursuit of the appellate process in the State Court of Civil Appeals.

Further, it is abundantly clear that no substantial federal question is presented by Petitioners herein. The record affirmatively demonstrates that Petitioners were not denied the right to vote or to participate in the bond election.

The record also shows that Petitioners failed to establish that any class existed and failed to establish that their suit met the jurisdictional prerequisites of Rule 23 of the Federal Rules of Civil Procedure, requiring that the class Petitioners purport to represent be so numerous that joinder of all of the members would be impracticable; that there be questions of law or fact common to the class; that the claims or defenses of the representative parties be typical of the claims or defenses of the class; and, lastly, Petitioners failed to establish that the representative parties will

fairly and adequately protect the interests of any class. It is abundantly clear from the record that no class existed. Five of the six Petitioners voted in the election, and their votes were tabulated and counted. The members of the class must be identifiable, and their identity cannot depend upon a state of mind. *Chaffee v. Johnson*, 229 F.Supp. 445 (S.D.Miss., 1964), affd., 352 F.2d 514 (5th Cir., 1965), cert. den., 384 U.S. 956.

None of Petitioners were immediately harmed or immediately threatened with harm. It is axiomatic that the Petitioners must be a part of the class they purport to represent. *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969).

It is idle for Petitioners to suggest that the decision of the Court of Appeals conflicts with prior decisions of this Court. It would be difficult, if not impossible, to find a more appropriate set of facts and circumstances to which to apply the doctrine of res judicata than the precise facts and circumstances in the case at bar.

Petitioners have attempted to mislead this Court by their assertions that the 141st Judicial District Court of Tarrant County, Texas, lacked jurisdiction to entertain Petitioners' State Court suit for declaratory judgment. Even a cursory examination of the authorities cited by Petitioners reveals that they do not afford any support for Petitioners' position.

As this Court well knows, it is the express purpose of the Uniform Declaratory Judgments Act (adopted in Texas as Article 2524-1, Vernon's Texas Civil

Statutes) to permit any person whose rights may be affected by a statute or municipal ordinance to file suit in the State Court to determine any question of construction or validity arising under such statute or municipal ordinance. As held in *McCart v. Cain*, 416 S.W.2d 463 (Tex.Civ.App., 1967, n.r.e.):

> "The Declaratory Judgments Act provides a method whereby parties may bring actions to determine their relative rights without waiting until they have suffered irreparable damage. To this end the Act provides for broad powers of construction in the Courts. Article 2524-1, Section 2, V.A.T.S., supra."

Petitioners brought their State Court suit pursuant to Article 2524-1, Vernon's Texas Civil Statutes, and the State Court correctly exercised its jurisdiction in rendering judgment adversely to Petitioners, from which judgment Petitioners voluntarily abandoned their appeal. None of the authorities cited by Petitioners supports a contrary view.

This Court will recall its admonitions contained in its well-considered action on February 23, 1971, when it decided *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701; *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669; *Samuels v. Mackell*, supra; *Dyson v. Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781; *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792; and *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696. On that day this Court affirmatively held that national policy forbids Federal Court intervention by injunction or declaratory judgment in cases initiated in

State Courts and pending at the time the federal suit is brought.

Resting solely on comity and the absence of factors necessary under equitable principles to justify federal intervention, and without considering whether 28 U.S.C., § 2283, which prohibits an injunction against State Court proceedings "except as expressly authorized by Act of Congress," would, in and of itself, be controlling, this Court, on February 23, 1971, re-affirmed the long-standing "abstention doctrine" and rejected lower Federal Court intervention in State prosecutions in the six cases decided. This Court in each case reversed or vacated each lower Federal Court determination as to the unconstitutionality or constitutionality, respectively, of the State statutes or ordinances challenged. Among those cases was *Perez v. Ledesma*, supra, and although each of such cases involved criminal prosecutions in which personal liberty may or may not have been curtailed, the philosophical judicial admonitions therein expressed are even more applicable to frivolous civil actions such as the case at bar. In this connection, in *Perez*, supra, this Court held in part as follows:

> "After crippling Louisiana's ability to enforce its criminal statute against Ledesma, the three-judge court expressed the view that the Parish of St. Bernard Ordinance 21-60 was invalid. Although the court below recognized that 'it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance,' the court nevertheless seized the 'opportunity to express its views of the constitutionality of the

ordinance.' 304 F.Supp. 662, 670 n. 31 (1969). Judge Boyle, the district judge who initially referred the action to the three-judge court, adopted that court's view and declared the parish ordinance invalid. There is considerable question concerning the propriety of issuing a declaratory judgment against a criminal law in the circumstances of this case.

* * *

"We are, however, unable to review the decision concerning the local ordinance because **this Court has no jurisdiction to review on direct appeal the validity of a declaratory judgment against a local ordinance,** such as St. Bernard Parish Ordinance 21-60. Even if an order granting a declaratory judgment against the ordinance had been entered by the three-judge court below (which it was not), that court would have been acting in the capacity of a single-judge court. We held in Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967), that a three-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U.S.C. § 1253 we have jurisdiction to consider on direct appeal only those civil actions 'required to be heard and determined' by a three-judge court. **Since the constitutionality of this parish ordinance was not 'required to be heard and determined' by a three-judge panel, there is no jurisdiction in this Court to review that question.**

"**The fact that a three-judge court was properly convened in this case** to consider the injunctive relief requested against the enforcement of the state statute, **does not give this Court juris-**

diction on direct appeal over other controversies where there is no independent jurisdictional base. Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them. See Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939)." (Emphasis supplied)

The greatest concern of Respondents in the case at bar is that the Petition for Writ of Certiorari be denied in the most rapid and expeditious manner. As a direct and proximate result of Petitioners' academic exercise in the maintenance of this litigation, the City of Fort Worth has been unable to issue and market $33,350,000 worth of general obligation bonds and employ the proceeds therefrom for the construction of vitally necessary public improvements, such as streets, storm drains, fire stations, and the enlargement of its sanitary sewage treatment plant. By reason thereof, Respondent City of Fort Worth has had to lay off, discharge, and contribute to the ranks of the unemployed approximately 75 personnel from its Engineering Department, unfortunately most of whom were heads of families.

An examination of the uncontroverted record herein conclusively demonstrates that by any mathematical computation known to man, the three bond propositions were adopted by a majority vote of both rendering property owners and non-rendering prop-

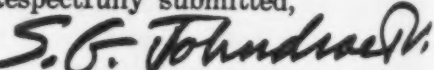
erty owners. No member of the entire electorate was prohibited from voting.

This Honorable Court would perform a wholesome and salutary function and serve the ends of justice by denying the Petition for Writ of Certiorari so that the City of Fort Worth can proceed with the vitally necessary public works of relieving an overloaded sewage treatment plant, constructing and repairing storm drains and streets, and improving fire protection.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals as set forth at pages 25-34 of the Petition for Writ of Certiorari and the Memorandum on Motions to Dismiss as set forth on pages 20-24 of the Petition are in all respects correct, and for the foregoing reasons the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,



S. G. JOHNDROE, JR.
City Attorney
Attorney for Respondents,
City of Fort Worth Et Al.
1000 Throckmorton Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for Petitioners in accordance with Paragraph 1 of Rule 33 by depositing the same in a United States Post Office, postage prepaid, addressed to Don Gladden, 702 Burk Burnett Building, Fort Worth, Texas 76102, counsel for Petitioners.

APPENDIX "A"

IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
141ST JUDICIAL DISTRICT

NO. 57283-C

KATHLEEN CARTER ET AL.

VS.

FORT WORTH INDEPENDENT SCHOOL DISTRICT AND THE CITY OF FORT WORTH

JUDGMENT

BE IT REMEMBERED that on the 12th day of June, 1970, duly and regularly came on to be considered the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter et al., and the Motion for Summary Judgment of the Defendants, the City of Fort Worth and the Fort Worth Independent School District, in the above numbered and entitled cause; and it appearing to the Court that the respective motions have been made in proper form and manner and in proper time, that proper service thereof has been had and that the plaintiffs and movants, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong, and the defendants and movants, City of Fort Worth and the Fort Worth Independent School District, are properly before this Court for a hearing on

their respective motions for summary judgment; and the Court, having considered the pleadings, the affidavits, admissions, motions, exhibits and depositions, as well as all instruments of record filed herein by both plaintiffs and defendants, and after having been fully advised in the premises, is of the opinion and finds that the pleadings, the affidavits, admissions, motions, exhibits, depositions and instruments of record on file herein conclusively demonstrate that there is no genuine issue as to any material fact and that the defendants and movants, the City of Fort Worth and the Fort Worth Independent School District, are entitled to judgment as a matter of law and that the Motion for Summary Judgment of the Plaintiffs, Kathleen Carter, Rita Parrish, Cecilia Stephens, Charles Ellis Dreyfus, Theresa Ludvigson and George Armstrong, should be and the same is hereby overruled.

IT IS, THEREFORE, ACCORDINGLY ORDERED, ADJUDGED AND DECREED that plaintiffs take nothing by their suit, that same be dismissed and held for naught, and that the defendants, the City of Fort Worth and the Fort Worth Independent School District, recover their costs against plaintiffs, for which let execution issue.

To all of which action on the part of the Court the plaintiffs then and there, in open court, duly excepted and objected and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth.

RENDERED AND SIGNED this the 2nd day of September, 1970.

/s/ JAMES E. WRIGHT
Judge

APPROVED AS TO FORM:

/s/ DON GLADDEN
Don Gladden
Attorney for Plaintiffs
702 Burk Burnett Building
Fort Worth, Texas 76102

/s/ CECIL A. MORGAN
Cecil A. Morgan
Attorney for Defendant,
Fort Worth Independent
School District
2108 Continental Life Bldg.
Fort Worth, Texas 76102

/s/ S. G. JOHNDROE, JR.
S. G. Johndroe, Jr.
Attorney for Defendant,
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1541

KATHLEEN CARTER, ET AL
VS.
CITY OF FORT WORTH, ET AL

MEMORANDUM ORDER

At a conference held between the respective attorneys for the parties hereto, except the Attorney General of the State of Texas, who has not made his appearance, on the morning of September 3, 1970, all parties recognized the following:

1. The ordinance setting the bond election for September 8, 1970, was adopted on August 10, 1970.

2. Prior to the time this suit was filed, the plaintiffs hereto filed a suit in the 141st District Court of Tarrant County, Texas, Cause No. 57283-C, Kathleen Carter, et al. vs. City of Fort Worth, et al, attacking the constitutionality of the same statutes which are challenged in the present action and seeking declaratory judgment for substantially the same relief as they asked for in the present case. Judgment in that suit was entered by the District Court on September 2, 1970, adversely to the plaintiffs, and an appeal has been taken from such judgment.

3. This suit was filed about 5:00 P. M. on August 31, 1970. It came to the attention of this Court on September 1, 1970, at a time when the Court was involved in the preparation of an opinion that he felt should be completed that day. On September 2, 1970, the Court sought to have a conference with counsel in this case, and the City Attorney was tied up in the trial of other litigation. The conference on this morning was the earliest that could have been had.

4. It is impractical and impossible to assemble a three-judge court and hold a meaningful hearing before the present bond election scheduled on September 8, 1970, as the Attorney General was entitled to five days notice and he has not yet made his appearance herein.

5. Plaintiffs have expressed that they do not desire to delay the holding of the pending election, but merely seek to insure by the filing of this suit their constitutional rights to meaningful(ly) participate in the election. They recognize the problem created by the time they filed their application for injunction in the federal court but insist that they are entitled to pursue the relief sought in their petition, insofar as they are entitled to injunctive relief from a three-judge court disposing of those matters which will not become moot as a result of the election procedure to be followed before the court could be assembled. The plaintiffs do not insist on any injunction which would prevent the holding of the bond election that is presently set for September 8, 1970.

6. The defendants, City of Fort Worth, Bateman

and Stovall, have filed a motion to dismiss and in opposition to the appointment of a three-judge court. Action on that motion will be held in abeyance until it is determined whether a three-judge court should be convened and, if so, whether such court should pass on the motion.

It is accordingly ordered that the bond election proceed as scheduled on September 8, 1970, and that this Court submit to the Chief Judge of the Fifth Circuit the request for the appointment and convening of a three-judge court, and that this case proceed in accordance with the directions of the Chief Judge when he has an opportunity to consider the request for a three-judge court.

Signed, September 3, 1970.

/s/ LEO BREWSTER
JUDGE

E COPY (D)

FILED
AUG 29 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners,*

vs.

CITY OF FORT WORTH ET AL., *Respondents.*

Supplemental Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, In Opposition to Petition for Writ of Certiorari

---

S. G. JOHNDROE, JR.
City Attorney
Attorney for Respondents,
CITY OF FORT WORTH ET AL.
1000 Throckmorton Street
Fort Worth, Texas 76102

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

TABLE OF CONTENTS

Page

ADDITIONAL REASON FOR REFUSING TO GRANT THE WRIT 1–8

CONCLUSION 9

CERTIFICATE OF SERVICE 9

APPENDIX "C" A-1–A-17

Plaintiffs' First Amended Complaint in CA-4-1975, now pending in the United States District Court for the Northern District of Texas, Fort Worth Division

APPENDIX "D" A-18–A-43

Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and The City of Fort Worth, Texas, a Municipal Corporation, in CA-4-1975, now pending in the United States District Court for the Northern District of Texas, Fort Worth Division

APPENDIX "E" A-44–A-45

Designation and Composition of Three-Judge Court in CA-4-1975, now pending in the United States District Court for the Northern District of Texas, Fort Worth Division

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

Docket No. 72-89

KATHLEEN CARTER ET AL., *Petitioners,*

vs.

CITY OF FORT WORTH ET AL., *Respondents.*

Supplemental Brief of Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, In Opposition to Petition for Writ of Certiorari

Now come Respondents, City of Fort Worth, Texas; Roy A. Bateman, City Secretary; and R. M. Stovall, Mayor, and in compliance with Rule 24 of the Rules of this Court file this, their Supplemental Brief, and for same would show the Court the following:

These Respondents would call to the attention of the Court an additional **Reason for Refusing to Grant the Writ:**

The United States District Judge, the Three-Judge Court and the Court of Appeals all properly refused to pass upon the constitutionality of Sections 3 and 3a, Article 6 of the Texas Constitution and Articles 5.03, 5.04 and 5.07 of the Texas Election Code since the State Court Judgment (Appendix "A", pp. 28-30, Original Brief of Respondents in Opposition to Peti-

tion for Writ of Certiorari) was res judicata, and jurisdiction clearly did not obtain.

In this connection, the Court of Appeals correctly held as follows:

> "The sole issue presently before us is: Whether the Three Judge Court or the District Court sitting as a single judge had jurisdiction of the case. We do not consider the merits.
>
> "Our prior decisions in Brown v. Chastain, *supra*, and Paul v. Dade County, *supra*, are plainly controlling here, as decided by the courts below. **The parties were the same, the issues were the same.** The plaintiffs lost what they allowed to become a final judgment in the state court and started over again in the federal courts. That is the point to be emphasized here. **The present parties are through. That does not foreclose the right of others to file an appropriate action in the federal system if the occasion should arise.**" Carter v. City of Fort Worth, 456 F.2d 572, 576 (1972) [Emphasis supplied]

The "**occasion**" referred to in the Court of Appeals opinion arose on April 11, 1972, on which date the City of Fort Worth conducted another municipal election at which two propositions were submitted to the electorate—one to determine whether or not the City Council of the City of Fort Worth should be authorized to issue tax-supported general obligation bonds for public transportation purposes and the other to determine whether or not general obligation bonds should be issued for the purpose of improving and equipping its library system and building a new library.

The "dual election" was held on said date in compliance with policies and instructions of the Attorney General of the State of Texas and further in compliance with Sections 3 and 3a of Article 6 of the Constitution of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code. The result of such election was that a majority of both the rendering property-owning voters, as well as the non-rendering property-owning voters, approved the issuance of the tax supported bonds for public transportation, but with respect to the library bond proposition, a majority of the voters who had property rendered for taxation voted against the issuance of the library bonds and a majority of the non-rendering voters voted in favor of the library bonds. The tabulation and result of the voting on the library bond proposition was as follows:

	Owners of Property Rendered for Taxation	*Non-Renderers*	*Total*
FOR	10,849	3,758	14,607
AGAINST	12,234	1,132	13,3[illegible]

On April 17, 1972, the same attorneys of record for Petitioners herein filed a class action complaint in the United States District Court for the Northern District of Texas, designated CA-4-1975, styled Michael L. Stone et al., Plaintiffs, vs. R. M. Stovall et al., Defendants, such suit being filed on behalf of parties other than Petitioners herein, but otherwise their suit is essentially a carbon copy of Petitioners' complaint in the case at bar, though wholly free from the taint of res judicata. Thereafter, Plaintiffs, Michael L. Stone et al., filed Plaintiffs' Second Amended

Complaint, both of which complaints sought the appointment of a three-judge court and a declaratory judgment and further sought

> "***to enjoin the enforcement of Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code and a portion of Section 19 of Chapter 25 of the Fort Worth City Charter, all of which provisions purport to limit the right to vote in bond elections to persons who own property which has been rendered for taxation."[1]

The relief prayed for by Plaintiffs in their First Amended Complaint filed April 28, 1972, in CA-4-1975, now pending in the United States District Court for the Northern District of Texas, is as follows:

> "PRAYER
>
> "WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request this Court to grant them the following relief:
>
> "1. The plaintiffs respectfully request the Court to declare Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City Charter of the City of Fort Worth which provides 'Provided, that no bonds shall be issued, or bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are

[1]See Appendix "C" hereto, post, p. A-1, for copy of Plaintiffs' First Amended Complaint (exhibits omitted), filed April 28, 1972, in Civil Action No. CA-4-1975, in the United States District Court for the Northern District of Texas.

in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued.' to be in irreconcilable conflict with the Fourteenth Amendment to the United States Constitution and hence unconstitutional and void.

"2. The plaintiffs respectfully request this Court to direct the defendants, S. G. Johndroe, the City Attorney, and his successors in office, the defendant City Council members and their successors in office, and the defendant City of Fort Worth to not consider the fact that a majority of property owners whose property had been rendered for tax purposes voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that they consider without differentiation, the aggregate vote cast and tabulated by all persons casting ballots.

"3. The plaintiffs respectfully request the Court to direct the Attorney General of Texas and his successors in office to not consider the fact that a majority of property owners voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that he consider, so far as the number of votes cast and tabulated, the fact that a majority of resident qualified voters of the City of Fort Worth voted for (in favor of) Proposition Number II in reaching such a decision.

"4. The plaintiffs respectfully request that this Court enjoin all of the defendants and their

successors in office from considering or giving any force or effect to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City of Fort Worth Charter set forth in number 1 above, in connection with the votes cast by the citizens of Fort Worth, Texas, in the April 11, 1972 bond election of the City of Fort Worth.

"5. The plaintiffs respectfully request this Court to enjoin all of the defendants and their successors in office from giving any effect or force in the future to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the Fort Worth City Charter set forth in number 1 above including segregating ballots.

"Plaintiffs respectfully request this Court to grant judgment in their favor, respectfully request that this Court grant them costs of suit and such other and further relief as they may show themselves entitled.

/s/ Don Gladden
DON GLADDEN
/s/ Marvin Collins
MARVIN COLLINS

GREATER FORT WORTH
CHAPTER OF THE
AMERICAN CIVIL LIBERTIES
UNION

702 Burk Burnett Building
Fort Worth, Texas 76102

ATTORNEYS FOR
PLAINTIFFS"

On May 8, 1972, the City of Fort Worth; S. G. Johndroe, Jr., City Attorney; R. M. Stovall, Mayor; Roy A. Bateman, City Secretary; and the members of the City Council of the City of Fort Worth, all Defendants in Civil Action No. CA-4-1975, filed their Original Answer,[2] and on May 9, 1972, Defendant Crawford Martin, Attorney General of the State of Texas, filed his Original Answer.

On May 10, 1972, in response to the request of the Honorable Leo Brewster, the United States District Judge for the Northern District of Texas, Fort Worth Division, the designation and composition of the Three-Judge Court requested by Plaintiffs was ordered by the Honorable John R. Brown, Chief Judge of the Fifth Circuit. Judge Brown designated Circuit Judge, Honorable Homer Thornberry, and District Judge, Honorable Halbert O. Woodward, to serve with the Requesting Judge, Honorable Leo Brewster, as members of, and with him to constitute the Three-Judge Court to hear and determine Civil Action No. CA-4-1975.[3]

Clearly and positively Petitioners' concern, as reflected on page 16 of the Petition for a Writ of Certiorari, that "the ultimate constitutional issue presented by this case is of great significance" is totally

---

[2]See Appendix "D" hereto, post, p. A-18, for copy of Original Answer of Defendants, R. M. Stovall, Mayor, et al. (exhibits omitted), filed May 8, 1972, in Civil Action No. CA-4-1975, now pending in the United States District Court for the Northern District of Texas.

[3]See Appendix "E" hereto, post, p. A-44, for copy of Designation and Composition of the Three-Judge Court, filed May 10, 1972, in Civil Action No. CA-4-1975, now pending in the United States District Court for the Northern District of Texas.

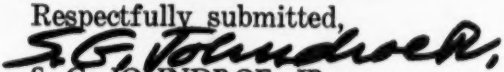
unfounded and pales into insignificance since the same attorneys of record for Petitioners have currently pending against the same Respondents herein Civil Action No. CA-4-1975, Michael L. Stone et al., Plaintiffs, vs. R. M. Stovall et al., Defendants, before a Three-Judge Court, an identical case unaffected by res judicata and in the process of being presented for determination by a three-judge court. An examination of Plaintiffs' First Amended Complaint therein and the Original Answer of Defendants, R. M. Stovall, Mayor, et al., reveals that all constitutional questions and issues involving Sections 3 and 3a of Article 6 of the Constitution of the State of Texas and Articles 5.03, 5.04 and 5.07 of the Texas Election Code have been raised and the issues have been joined as to whether or not such Texas election provisions are valid with respect to who may vote in elections for the purpose of determining whether or not tax-supported general obligation bonds may be issued.

Respondents submit that Petitioners' harassing and vexatious litigation will be ended, that a multiplicity of suits will be avoided, and that the efficient administration of justice will be served by denying the Petition for a Writ of Certiorari so that the City of Fort Worth may proceed with the sale and issuance of the $33,350,000 worth of general obligation bonds authorized by a majority of the electorate on September 8, 1970, for the construction of vitally necessary public works.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals was in all things correct, and for the foregoing additional reason the Petition for a Writ of Certiorari filed herein should be denied.

Respectfully submitted,



S. G. JOHNDROE, JR.
City Attorney
Attorney for Respondents,
CITY OF FORT WORTH
ET AL.
1000 Throckmorton Street
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

A copy of this Supplemental Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for Petitioners in accordance with Paragraph 1 of Rule 33 by depositing the same in a United States Post Office, first class, postage prepaid, addressed to Don Gladden, 702 Burk Burnett Building, Fort Worth, Texas 76102, counsel of record for Petitioners.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-4-1975

MICHAEL L. STONE
3000 Ave. G
Fort Worth, Texas 76105

DOROTHY I. ELLIS
2528 Ridgmar Blvd.
Apt. #3
Fort Worth, Texas 76116

PAT CROWLEY
1904 Rockridge Terrace
Fort Worth, Texas 76110

JAMES D. HENDERSON
4732 Fawn Dr.
Fort Worth, Texas 76132

MARJORIE M. WATSON
6024 Wonder Dr.
Fort Worth, Texas 76133

PLAINTIFFS

vs.

THE CITY OF FORT WORTH
1000 Throckmorton
Fort Worth, Texas

CRAWFORD MARTIN
Attorney General
Office of the Attorney General
Austin, Texas

S. G. JOHNDROE
City Attorney
1000 Throckmorton
Fort Worth, Texas

JESS W. JOHNSTON, JR.
Council Member
1000 Throckmorton
Fort Worth, Texas

W. S. KEMBLE, JR.
Council Member
1000 Throckmorton
Fort Worth, Texas

JOHN J. O'NEILL
Council Member
1000 Throckmorton
Fort Worth, Texas

R. M. STOVALL
Mayor
1000 Throckmorton
Fort Worth, Texas

TED C. PETERS
Council Member
1000 Throckmorton
Fort Worth, Texas

ROY A BATEMAN
City Secretary
1000 Throckmorton
Fort Worth, Texas

PAT REECE
Council Member
1000 Throckmorton
Fort Worth, Texas

LEONARD E. BRISCOE
Council Member
1000 Throckmorton
Fort Worth, Texas

MRS. MARGRET RIMMER
Council Member
1000 Throckmorton
Fort Worth, Texas

TAYLOR GANDY
Council Member
1000 Throckmorton
Fort Worth, Texas

DEFENDANTS

PLAINTIFFS' FIRST AMENDED COMPLAINT

1

On April 11, 1972, the City of Fort Worth held a bond election in which the plaintiffs voted. Their votes were not, and will not be, given equal weight with the votes of certain other persons who voted in that election.

2

The plaintiffs bring this suit to vindicate their right to have their vote in bond elections counted equally with the votes of all other people in such elections, and to enjoin the enforcement of Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code and a

portion of Section 19 of Chapter 25 of the Fort Worth City Charter, all of which provisions purport to limit the right to vote in bond elections to persons who own property which has been rendered for taxation.

3

Jurisdiction is conferred on this court by 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3).

4

This case is brought pursuant to: 28 U.S.C. §§ 2201 and 2202 for a declaratory judgment; 28 U.S.C. §§ 2281 and 2284, requiring the convening of a three-judge court; and Rule 23 (a) (b) of the Federal Rules of Civil Procedure providing for a class action in certain cases.

5

This action is brought by the plaintiffs against the City of Fort Worth, Crawford Martin, Attorney General of Texas, S. G. Johndroe, City Attorney for the City of Fort Worth, R. M. Stovall, Mayor of the City of Fort Worth, Roy A. Bateman, City Attorney for the City of Fort Worth, and all members of the City Council of the City of Fort Worth.

CLASS ACTION

The plaintiffs are members of a class of natural persons in the City of Fort Worth who voted in the City of Fort Worth bond election of April 11, 1972, against whom the defendant, City of Fort Worth and defendants city officials of the City of Fort Worth have unconstitutionally discriminated, against whom the

defendant City of Fort Worth and the defendants city officials of the City of Fort Worth have threatened to, and are about to, unconstitutionally discriminate, and against whom the defendant Attorney General has threatened to, and is about to, unconstitionally discriminate. The unconstitutional discrimination just complained of consists of the enforcement of the provisions of the Constitution and Statutes of the State of Texas, and a portion of the Fort Worth City Charter, all of which require ownership of property which has been rendered for taxation as a prerequisite to the right of qualified voters to vote in non-federal bond elections, as hereinafter more fully appears. This class of Fort Worth citizens is so numerous that it is impractical to join all of them in one action. There are questions of law common to all of the members of the class, to-wit: the application of Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and a portion of Chapter 25, § 19 of the Fort Worth City Charter, and the application of a system of dual balloting originally conceived by the Attorney General of the State of Texas, and applied in the Fort Worth city bond election held on April 11, 1972. There are questions of fact common to all members of the class, since the discrimination of which plaintiffs complain took place during or arises or will arise out of, the Fort Worth city bond election held on April 11, 1972. The claims of the parties plaintiff to this action are typical of the claims of the class in that the members of the class are seeking to have their votes counted equally with the votes of other, more privileged voters who were

permitted to vote in the Fort Worth city bond election of April 11, 1972. The parties plaintiff in this action will fairly and adequately protect the interests of the class as a whole. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class not parties to this adjudication. The defendants have acted, refused to act, threatened to act, threatened to refuse to act, and are about to act and about to refuse to act, on grounds generally applicable to the plaintiffs' class, to-wit: the defendants have refused, threatened to refuse, and are about to refuse to sell, certify, approve, or otherwise ratify Proposition Number II which was submitted to the qualified voters of the City of Fort Worth in a bond election held on April 11, 1972, in which a majority of the qualified voters of the City of Fort Worth voted for Proposition Number II. The defendants have refused, threatened to refuse, and are about to refuse to so sell, certify, and approve and otherwise ratify these bonds for the reason that a majority of the persons who voted in that election as property owners voted against Proposition Number II, such refusal and threatened refusal being made by the defendants on the basis that Article 6 §§ 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and a portion of Chapter 25 § 19 of the Fort Worth City Charter, require a majority of persons voting as property owners to vote in favor of the proposition, as a prerequisite to

such selling or approval, or both such selling and approval. Furthermore, the questions of law and fact common to the members of the class dominate over any other questions which affect only individual members.

7

PLAINTIFFS

All of the plaintiffs voted in the Fort Worth city bond election held on April 11, 1972, all of the plaintiffs cast ballots on both of the propositions submitted, and all of the plaintiffs voted for (in favor of) Proposition Number II. True and correct copies of affidavits executed by each of the plaintiffs in which each plaintiff swears that he voted and how he voted, are attached to this petition as Exhibit A, and they are hereby incorporated by reference in this petition as though fully and correctly set out herein. A true and correct copy of the voter lists or poll lists for the April 11, 1972 City of Fort Worth Bond Election which contain the names of the plaintiffs are attached to this petition as Exhibit B, which exhibit is hereby incorporated by reference in this petition as though fully and correctly set out herein.

8

Plaintiffs Michael L. Stone, Dorothy I. Ellis, and James D. Henderson voted as qualified voters of the City of Fort Worth and not as rendering property owners. They voted for (in favor of) Proposition Number II.

A true and correct copy of the affidavits signed by

those plaintiffs, at the polling places on April 11, 1972 (except that signed by Plaintiff Henderson) is attached to this petition as Exhibit C and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

9

Plaintiffs Pat Crowley and Marjorie M. Watson voted in the Fort Worth City Bond Election on April 11, 1972, as rendering property owners. They voted for (in favor of) Proposition Number II.

A true and correct copy of the affidavits signed by those plaintiffs at the polling places on April 11, 1972 is attached to this petition as Exhibit D and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

10

Plaintiffs are all natural persons who on and prior to April 11, 1972, and who are presently:

1. not subject to any of the voter disqualifications set forth in Article 6 § 1 of the Texas Constitution;
2. persons who have attained the age of 18 years;
3. citizens of the United States;
4. persons who resided in Fort Worth, Tarrant County, Texas 30 days next preceding April 11, 1972; and
5. persons who have registered annually before offering to vote at the Fort Worth City Bond Election held on April 11, 1972.

A true and correct copy of the respective voter registration certificates of each of the plaintiffs is attached to this petition as Exhibit E, and is hereby incorporated by reference in this petition as though fully and correctly set out herein.

11

DEFENDANTS: DUTIES

Defendant Roy A. Bateman, City Secretary of the City of Fort Worth, was charged with administrative duties concerning the preparing and holding of this election by Ordinance Number 6644, and is charged therein with the administration of the election laws of the State of Texas.

12

The defendant S. G. Johndroe in his capacity as City Attorney has duties which include the preparation of all bonds in which the city is concerned, endorsing his approval on the bonds as to the form and legality thereof, and which include the power to prevent the bonds from becoming effective. This authority is conferred upon the City Attorney by Chapter 6, section 3 of the City Charter of the City of Fort Worth, a true and correct copy of which is attached to this Complaint as Exhibit F, and which is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

13

Defendants members of the City Council of the City of Fort Worth have the power to make all necessary

regulations concerning the manner of holding elections in the City of Fort Worth.

This authority is conferred upon the City Council by Chapter 28 § 29 of the Fort Worth City Charter, a true and correct copy of which is attached to this petition as Exhibit G, and which is hereby incorporated by reference in this petition as though fully and correctly set out herein.

14

Defendants members of the City Council of the City of Fort Worth have the authority to provide for the issuance and sale of bonds for legitimate purposes. This authority is conferred upon the City Council by Chapter 25, § 19 of the Fort Worth City Charter, a true and correct copy of which is attached to this Complaint as Exhibit H, and which is hereby incorporated by reference herein as though fully and correctly set out in this Complaint.

15

The defendant Attorney General of Texas has duties which include the certification of legality of proceedings underlying the issue of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

16

ELECTION

On the 13th day of March, 1972, the City of Fort Worth adopted Ordinance Number 6644 which pro-

vided for a submission of two bond propositions to the voters of the City of Fort Worth, the election to be held on April 11, 1972. Proposition I provided for submission to the voters of bonds for a transit system. Proposition II provided for submission to the voters of bonds for library facilities. The election was held on April 11, 1972.

A true and correct copy of Ordinance Number 6644 is attached to this Complaint as Exhibit I and is hereby incorporated by reference herein as though fully and correctly set out in this petition.

17

On the 17th day of April, 1972 the City Council of the City of Fort Worth approved and adopted the returns of the Fort Worth City bond elections held on April 11, 1972 which reflected the following results of the election, as to Proposition Number II:

Property Owners	
For:	10,849
Against:	12,234
Non-property Owners:	
For:	3,758
Against:	1,132
Total For:	14,607
Total Against:	13,366

A true and correct copy of the minutes of the City Council of the City of Fort Worth approving and adopting the returns is attached to this Complaint as Exhibit J and is hereby incorporated by reference

in this Complaint as though fully and correctly set out herein.

18

Prior to the holding of the election of April 11, 1972, the defendant City Secretary of Fort Worth issued instructions to each of the election judges for the bond election. These instructions basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from voters who did not own taxable property rendered for taxation.

19

Defendant City of Fort Worth and Roy A. Bateman made available two separate affidavits for voters at the polling places on April 11, 1972: one such affidavit for persons owning taxable property which had been duly rendered or assessed for taxation and the other affidavit for persons who did not wish to sign an affidavit reciting ownership of taxable property which has been duly rendered or assessed for taxation.

A true and correct copy of that affidavit is attached to this Complaint as Exhibit K and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

20

The defendants members of the City Council of the City of Fort Worth would, but for the complained of Texas Constitutional and statutory provisions, attempt to issue and sell bonds approved by the voters

of the City of Fort Worth on April 11, 1972, in Proposition Number II.

On April 17, 1972, the City Council of the City of Fort Worth, Texas, while in regular session, unanimously passed a statement of intent to the effect that, but for legal entanglements involving the discrepancy between the aggregate total of votes approving Proposition Number II, and the total property owner votes disapproving such proposition, the bonds approved in Proposition Number II would be sold, and certification from the Attorney General of Texas would be sought. A true and correct copy of the Minutes of the City Council adopting that statement of intent is attached to this Complaint as Exhibit L and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

21

On July 10, 1969, December 19, 1969, and July 10, 1970, the Attorney General of Texas issued statements concerning the policy of the office of the Attorney General with respect to bond issues approved by qualified voters in elections limiting the franchise to rendering property taxpayers. In those statements, he made it abundantly clear that he would not approve any bond issues in which a majority of rendering property tax-payers had voted against the issue.

A true and correct copy of those statements is attached to this Complaint as Exhibit M, and is hereby incorporated by reference in this Complaint as though fully and correctly set out herein.

22

Defendant S. G. Johndroe has publicly stated that the Attorney General has refused to certify bonds approved in identical circumstances and it would be pointless to submit the library bonds (that is, the bonds submitted in Proposition Number II) to the Attorney General, and has stated that it is just the same as if the issue had failed.

23

Plaintiffs Michael L. Stone, Dorothy I. Ellis, and James D. Henderson have been aggrieved and will be aggrieved by the attacked Texas provisions and Fort Worth City Charter provisions as follows:

they voted for (in favor of) Proposition Number II which was passed by a majority of qualified voters for the City of Fort Worth but which was disapproved by the persons voting as property owners. These plaintiffs, as persons who have not rendered property for taxation, have been discriminated against, since their votes were not given equal weight by the defendants compared to the votes of the property owners. They have thus been denied equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

24

Plaintiffs Pat Crowley and Marjorie M. Watson, as rendering property owners, voted for (in favor of) Proposition Number II which, though it received a majority of the votes cast in the aggregate by all of the qualified voters of the City of Fort Worth, was

defeated in the rendering property owners tabulation. As members of the general class of persons who voted for (in favor of) Proposition Number II, their votes have been denied equal weight with the votes of the rendering property owners who voted against Proposition Number II. This is so, since all rendering property owners who voted against Proposition Number II were given a veto power over all other voters voting in the April 11, 1972 election. Their constitutional rights to equal protections of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States have thus been violated.

All of the plaintiffs are unwilling to have their right to vote, or their right to have their vote counted, based upon wealth, property ownership of any kind, or rendition of property for taxation. As citizens of Fort Worth and of the United States these plaintiffs and 14,602 others like them have a right to more than a practice vote in a bond election. The children of these plaintiffs and the children of many of the other 14,602 persons similarly situated have just as much need for an adequate library as do the children of the more fortunate property owners. Unless it is right, constitutionally, for the wealthy citizens of Fort Worth to rule and the poor citizens of Fort Worth to be ruled by them, all of these plaintiffs were denied equal protection of the law.

25

Thus there is plainly no adequate administrative remedy for the plaintiffs and they therefore need not

exhaust or attempt to exhaust any further administrative remedies.

26

Furthermore, the plaintiffs have no adequate remedy at law.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request this Court to grant them the following relief:

1. The plaintiffs respectfully request the Court to declare Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City Charter of the City of Fort Worth which provides "Provided, that no bonds shall be issued, or bonded debt created, unless authority therefor shall first be submitted to the qualified voters who pay taxes on property situated within the corporate limits of the City of Fort Worth; and, if a majority of the votes cast at such election are in favor of the issuance of such bonds, then such issue shall be made; but, should the majority of the votes cast at said election be against the proposition, then such bonds shall not be issued." to be in irreconcilable conflict with the Fourteenth Amendment to the United States Constitution and hence unconstitutional and void.

2. The plaintiffs respectfully request this Court to direct the defendants, S. G. Johndroe, the City Attorney, and his successors in office, the defendant City

Council members and their successors in office, and the defendant City of Fort Worth to not consider the fact that a majority of property owners whose property had been rendered for tax purposes voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that they consider without differentiation, the aggregate vote cast and tabulated by all persons casting ballots.

3. The plaintiffs respectfully request the Court to direct the Attorney General of Texas and his successors in office to not consider the fact that a majority of property owners voted against Proposition Number II in deciding whether or not to sell, issue, certify or otherwise approve the bonds submitted to the voters of the City of Fort Worth in the April 11, 1972 bond election, but rather that he consider, so far as the number of votes cast and tabulated, the fact that a majority of resident qualified voters of the City of Fort Worth voted for (in favor of) Proposition Number II in reaching such a decision.

4. The plaintiffs respectfully request that this Court enjoin all of the defendants and their successors in office from considering or giving any force or effect to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the City of Fort Worth's Charter set forth in number 1 above, in connection with the votes cast by the citizens of Fort Worth, Texas, in the

April 11, 1972 bond election of the City of Fort Worth.

5. The plaintiffs respectfully request this Court to enjoin all the defendants and their successors in office from giving any effect or force in the future to Article 6, Sections 3 and 3a of the Texas Constitution, Articles 5.03, 5.04, and 5.07 of the Texas Election Code, and that portion of Section 19 of Chapter 25 of the Fort Worth City Charter set forth in number 1 above, including segregating ballots.

Plaintiffs respectfully request this Court to grant judgment in their favor, respectfully request that this Court grant them costs of suit and such other and further relief as they may show themselves entitled.

/s/ Don Gladden
DON GLADDEN
/s/ Marvin Collins
MARVIN COLLINS

GREATER FORT WORTH
CHAPTER OF THE
AMERICAN CIVIL LIBERTIES
UNION

702 Burk Burnett Bldg.
Fort Worth, Texas 76102
ATTORNEYS FOR
PLAINTIFFS

(Exhibits omitted)

APPENDIX "D"

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-4-1975

MICHAEL L. STONE ET AL., *Plaintiffs,*

vs.

R. M. STOVALL ET AL., *Defendants.*

Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and The City of Fort Worth, A Municipal Corporation

---

TO THE HONORABLE JUDGE OF SAID COURT:

Now come R. M. Stovall, Mayor of the City of Fort Worth; S. G. Johndroe, Jr., City Attorney of the City of Fort Worth; Roy A. Bateman, City Secretary of the City of Fort Worth; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John

J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, members of the City Council of the City of Fort Worth; and the City of Fort Worth, some of the defendants in the above numbered and styled cause, and file this, their Original Answer, and for same would respectfully show the Court the following:

1.

These defendants would show that the plaintiffs have wholly failed to state a claim upon which relief can be granted and respectfully move this Court to render judgment on the pleadings and to dismiss Plaintiffs' First Amended Complaint.

2.

These defendants admit the averments contained in Paragraph 1 of Plaintiffs' First Amended Complaint to the effect that

> "On April 11, 1972, the City of Fort Worth held a bond election in which the plaintiffs voted.",

but in the absence of more information can neither admit nor deny the averments to the effect that

> "***Their votes were not, and will not be, given equal weight with the votes of certain other persons who voted in that election."

3.

These defendants can neither admit nor deny the averments contained in Paragraph 2 of Plaintiffs' First Amended Complaint wherein plaintiffs seek to

convey their personal reasons and purposes in bringing this suit.

4.

These defendants deny the conclusion contained in Paragraph 3 of Plaintiffs' First Amended Complaint to the effect that

> "Jurisdiction is conferred on this court by 42 U.S.C. § 1983, and 28 U.S.C. § 1343 (3)."

5.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 4 of Plaintiffs' First Amended Complaint to the effect that plaintiffs seek to bring their case under certain Acts of Congress and Federal Rules of Civil Procedure.

6.

These defendants admit the averments contained in Paragraph 5 of Plaintiffs' First Amended Complaint.

7.

These defendants deny the averments contained in Paragraph 6 of Plaintiffs' First Amended Complaint to the effect that plaintiffs have been unconstitutionally discriminated against by any of these defendants or that any of these defendants have threatened to, or are about to, unconstitutionally discriminate against any of plaintiffs. Defendants would show that Plaintiffs' First Amended Complaint wholly fails to state any fact or facts showing that any class exists;

that any class is so numerous that joinder of all members is impracticable; that there are questions of law or fact common to any class; that claims or defenses of any representative parties are typical of the claims or defenses of any class; or that plaintiffs herein are representative parties who are in a position to fairly and adequately protect the interests of any purported class.

These defendants would further show that plaintiffs have failed to aver any fact or facts showing that these defendants have acted in a manner which may be injurious to any class or that a class action is superior to other available methods for the fair and efficient adjudication of any alleged controversy.

These defendants further deny the averments to the effect that these

> "****defendants have acted, refused to act, threatened to act, threatened to refuse to act, and are about to act and about to refuse to act, on grounds generally applicable to the plaintiffs' class, to-wit: the defendants have refused, threatened to refuse, and are about to refuse to sell, certify, approve, or otherwise ratify Proposition Number II which was submitted to the qualified voters of the City of Fort Worth in a bond election held on April 11, 1972, in which a majority of the qualified voters of the City of Fort Worth voted for Proposition Number II."

These defendants further deny any and all averments contained in Paragraph 6 of Plaintiffs' First Amended Complaint to the effect that they have refused, threatened to refuse, and are about to refuse

to so sell, certify and approve and otherwise ratify any bonds for the reasons stated therein.

These defendants would further show that on February 9, 1972, the City of Fort Worth did, in fact, issue $17,790,000 in General Obligation Bonds and that among the covenants and agreements made by the City of Fort Worth at the time of such sale was a covenant to the effect that no additional General Obligation Bonds would be sold within ninety (90) days from the date of such sale.

8.

These defendants admit the averments contained in Paragraph 7 of Plaintiffs' First Amended Complaint to the effect that

> "All of the plaintiffs voted in the Fort Worth city bond election held on April 11, 1972 ***.",

but are without knowledge or information sufficient to form a belief as to the truth of the averment that

> "***plaintiffs cast ballots on both of the propositions submitted, and all of the plaintiffs voted for (in favor of) Proposition Number II."

9.

These defendants admit the averments contained in Paragraph 8 of Plaintiffs' First Amended Complaint to the effect that plaintiffs, Michael L. Stone, Dorothy I. Ellis and James D. Henderson, voted as qualified voters of the City of Fort Worth and not as "rendering property owners," but are without knowledge or information sufficient to form a belief as to

the truth of the averment to the effect that

> "****They voted for (in favor of) Proposition Number II.",

since the manner in which an individual may or may not have voted is a matter of secrecy and known only to the individual voter.

10.

These defendants deny the averments contained in Paragraph 9 of Plaintiffs' First Amended Complaint to the effect that

> "****Pat Crowley *** voted in the Fort Worth City Bond Election on April 11, 1972,"

as a rendering property owner, but admit the averment to the effect that

> "****Marjorie M. Watson voted in the Fort Worth City Bond Election on April 11, 1972,"

as a rendering property owner. These defendants would show, however, that one "Crowley, George A., Mrs.," did vote in the Fort Worth City Bond Election on April 11, 1972, as a rendering property owner. These defendants are without knowledge or information sufficient to form a belief as to the truth of the averment to the effect that

> "****They voted for (in favor of) Proposition Number II.",

since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter.

11.

These defendants admit the averments contained in Paragraph 10 of Plaintiffs' First Amended Complaint.

12.

These defendants deny the averments contained in Paragraph 11 of Plaintiffs' First Amended Complaint to the effect that

> "Defendant Roy A. Bateman, City Secretary of the City of Fort Worth, was charged with administrative duties concerning the preparing and holding of this election by Ordinance Number 6644, and is charged therein with the administration of the election laws of the State of Texas.",

and on the contrary would show that under Article 7.13 of the Texas Election Code, it is expressly provided with respect to municipal elections that

> "***In all such elections, the mayor, the city secretary, and/or the governing body shall do and perform each act which in other elections are required to be done and performed respectively by the county judge, the county clerk and the Commissioners Court."

Further in this connection these defendants would show that under Section 11 of Ordinance No. 6644, which ordinance was adopted by the City Council of the City of Fort Worth, Texas, on the 13th day of March, 1972, and which ordinance constituted the election order for the bond election held on April 11,

1972, as well as the notice thereof, it was provided as follows:

> "That the way and manner of holding this election, the notice to be given therefor, the polling places, the personnel of the officers, precinct judges and substitutes therefor who are to hold the same, and all details connected with the holding of the election shall be determined and arranged by the City Council and administered under the direction of and by the City Secretary."

13.

These defendants admit the averments contained in Paragraph 12 of Plaintiffs' First Amended Complaint to the effect that under the provisions of Chapter VI, Section 3, of the Charter of the City of Fort Worth, the defendant City Attorney has duties which include the preparation of all contracts, bonds and other instruments in writing in which the City is concerned and that the defendant City Attorney is possessed with the authority of "endorsing his approval on the bonds as to the form and legality thereof," and that it is expressly provided in Section 3 of Chapter VI of said Charter that "no such bond, contract or instrument shall become effective without such endorsement by the City Attorney thereon."

14.

These defendants admit the averment contained in Paragraph 13 of Plaintiffs' First Amended Complaint to the effect that members of the City Council of the City of Fort Worth have the power to make all necessary regulations concerning the manner of holding

elections in the City of Fort Worth, all of which is provided for in Section 29 of Chapter XXVIII of the Charter of the City of Fort Worth.

15.

These defendants deny the averment contained in Paragraph 14 of Plaintiffs' First Amended Complaint to the effect that

> "Defendants members of the City Council of the City of Fort Worth have the authority to provide for the issuance and sale of bonds for legitimate purposes.",

since as a matter of law no individual member of the City Council has any authority whatsoever to provide for the issuance and sale of bonds for legitimate purposes. These defendants do admit, however, that the City Council of the City of Fort Worth, acting as the duly authorized governing body of the City, has the power and authority to initiate proceedings which may or may not eventually "provide for the issuance and sale of bonds for legitimate (municipal) purposes."

In this connection these defendants further aver that under the provisions of Article 709 of the Revised Civil Statutes of the State of Texas, it is expressly provided that

> "Before any bonds shall be offered for sale, *** the mayor *** shall forward the bonds to the Attorney General, together with a certified copy of the order or ordinance levying the tax to pay the interest and provide a sinking fund, and a statement of the total bonded indebtedness of

> the *** city ***, including the series of bonds proposed, together with the amount of the assessed value of the *** city *** for purposes of taxation as shown by the last official assessment of such *** city ***. Such *** mayor shall also furnish the Attorney General with any additional information he may require."

Further, it is specifically provided in part in Article 709d that

> "When *** the bonds of any incorporated city *** are offered for sale, the party offering, or proposing to sell, such bonds, obligations, and pledges shall first submit them to the Attorney General, who shall carefully inspect and examine the same in connection with the law under which they were issued, and shall diligently inquire into the facts and circumstances so far as may be necessary to determine the validity thereof; and, upon being satisfied that such bonds, obligations, and pledges were issued in conformity with law, and that they are valid and binding obligations, he shall thereupon certify to their validity, and his certificate to that effect, so procured by the party offering such bonds, obligations, and pledges as the case may be, shall be submitted to the Comptroller *** with the bonds, obligations, and pledges so offered for sale, and shall be carefully preserved by the Comptroller. ***"

16.

These defendants admit the averments contained in Paragraph 15 of Plaintiffs' First Amended Complaint to the effect that the defendant Attorney General of Texas has duties which include the certifica-

tion of the legality of proceedings underlying the issuance of any proposed municipal bonds and the issuance of an opinion as to such legality prior to their registration by the Comptroller of Public Accounts of the State of Texas.

17.

These defendants admit the averments contained in Paragraphs 16 and 17 of Plaintiffs' First Amended Complaint to the effect that the City of Fort Worth held a bond election on April 11, 1972, pursuant to Ordinance No. 6644, adopted on the 13th day of March, 1972. For the benefit of the Court, these defendants would show that said ordinance provided for the submission of two propositions to the voters of the City of Fort Worth, including qualified electors who own taxable property in the City and who had duly rendered the same for taxation as well as all other resident, qualified electors of said City. Such propositions were as follows:

"I.

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Three Million Dollars ($3,000,000.00) for the legitimate municipal purpose of acquiring, equipping and improving the physical equipment and personal property of the Fort Worth Transit Company, a private corporation, and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing

interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, pavable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?

"II.

Shall the City of Fort Worth, Texas, through its City Council, issue its negotiable coupon bonds in the principal sum of Six Million, Eight Hundred Sixty Thousand Dollars ($6,860,000.00) for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system and acquiring the necessary lands therefor, said bonds being payable serially as may be determined by the City Council, so that the last maturing bonds shall become payable within forty (40) years from the date thereof, bearing interest at a rate not to exceed the maximum prescribed by law at the time of the issuance thereof, payable semi-annually, and levy a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof?"

Further in this connection these defendants would show that the returns of the municipal election of the City of Fort Worth held on April 11, 1972, were canvassed and approved by the City Council of said City in regular, open, public meeting on April 17, 1972, which canvass and approval reflect the following:

"Councilman Gandy made a motion, seconded by Councilman Briscoe, that the tabulation of

returns of the City of Fort Worth Bond Election held April 11, 1972, as prepared from the certified returns, submitted by the judges and clerks in each election precinct and presented by the City Secretary, be found correct, and that the votes cast on Proposition No. 1, as submitted were:

	Owners of Property Rendered for Taxation	*Non-Renderers*	*Total*
For	13,466	4,094	17,560
Against	9,834	850	10,684

and that the votes cast on Proposition No. 2, were:

For	10,849	3,758	14,607
Against	12,234	1,132	13,366

and that the tabulation of returns of said election be in all things approved and adopted. When the motion was put to a vote by the Mayor, it prevailed unanimously."

18.

These defendants admit the averments contained in Paragraph 18 of Plaintiffs' First Amended Complaint to the effect that prior to the holding of the election of April 11, 1972, the defendant City Secretary of the City of Fort Worth issued a letter of instructions to each of the election judges for the bond election. Further in this connection, these defendants would show that such instructions basically required the separation of the votes of persons who owned taxable property which had been rendered for taxation from those of qualified electors or voters who had not rendered property for taxation.

19.

These defendants admit the averments contained in Paragraph 19 of Plaintiffs' First Amended Complaint to the effect that the defendants, City of Fort Worth and Roy A. Bateman, made available two separate affidavits for voters at the polling places on April 11, 1972, one such affidavit for persons owning taxable property which had been duly rendered or assessed for taxation and the other affidavit for persons who did not wish to sign an affidavit reciting ownership of taxable property which has been duly rendered or assessed for taxation.

20.

These defendants deny the averments contained in Paragraph 20 of Plaintiffs' First Amended Complaint reading as follows:

> "The defendants members of the City Council of the City would, but for the complained of Texas Constitutional and statutory provisions, attempt to issue and sell bonds approved by the voters of the City of Fort Worth on April 11, 1972, in Proposition Number II.",

and on the contrary would show the Court that the following motion was adopted by the City Council:

> "Councilman Gandy made a motion, seconded by Councilman Briscoe, that the City Council go on record as stating that if the legal entanglements did not exist, the City would proceed to sell the library bonds voted April 11, 1972, to build a new central library, provided the other terms and conditions surrounding the sale of the

bonds and construction bid procedures were reasonable and acceptable to the City Council, and when the motion was put to a vote by the Mayor, it prevailed unanimously."

Further in this connection these defendants would show that under Section 30 of Chapter XXVIII of the Charter of the City of Fort Worth, it is expressly provided as follows:

"Every officer of the City shall, before entering upon the duties of his office, take and subscribe to an oath or affirmation, to be filed and kept in the office of the City Secretary, that he will support, protect and defend the Constitution and laws of the United States and of the State of Texas, and in all respects faithfully discharge the duties of his office or position."

21.

These defendants admit the averments contained in Paragraph 21 of Plaintiffs' First Amended Complaint to the effect that on July 10, 1969, December 19, 1969, and July 10, 1970, the Attorney General of Texas issued statements concerning the policy of the Office of the Attorney General with respect to bond issues approved by qualified voters in elections limiting the franchise to rendering property taxpayers. Further in this connection, these defendants say that such policy statements speak for themselves.

22.

These defendants deny the conclusions contained in Paragraph 22 of Plaintiffs' First Amended Complaint wherein plaintiffs aver that the defendant S. G. John-

droe "has publicly stated" certain words, but these defendants do admit that defendant S. G. Johndroe advised the City Council of the City of Fort Worth "that the Attorney General has refused to certify bonds approved in identical circumstances and it would be pointless to submit the library bonds (that is, the bonds submitted in Proposition Number II) to the Attorney General," and has generally advised the City Council of the City of Fort Worth that it is just the same as if the issue had failed.

In this connection and by way of explanation, it is admitted that the defendant S. G. Johndroe, Jr., has advised the City Council of the opinion delivered March 10, 1971, in *Montgomery Independent School District v. Crawford Martin, Attorney General of Texas*, 464 S.W.2d 638 (1971), wherein the Texas Supreme Court upheld the validity of Article 6, Section 3a, of the Texas Constitution when challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment; and the Supreme Court of Texas also found that such provision did not violate, but strengthened, the Equal Protection Clause of the Fourteenth Amendment. Further in this connection, the defendant S. G. Johndroe, Jr., informed the City Council that prior to issuing and selling any general obligation bonds, it is a matter of necessity to publish an official notice of the sale thereof, to describe and provide for terms and specifications in the sale thereof; to make provision for redemption, denomination, type of bid and interest rates, and basis of award; to provide for a good faith deposit; to provide for printing and the furnishing

of the purchaser's written opinion; to prepare no-litigation certificates; to provide for delivery; to regulate future sales; and to prepare and furnish an official bid form, and that after the taking of bids thereon, it is necessary to provide a complete transcript of the proceedings, to adopt an ordinance levying the tax to pay the interest and provide a sinking fund, to provide a statement of the total bonded indebtedness of the City, including the series of bonds proposed, together with the amount of the assessed value of the real, personal and mixed property in the City for purposes of taxation as shown by the last official assessment rolls, and to furnish the Attorney General with any additional information that he may require.

These defendants would further show that under their oath or affirmation filed and kept in the Office of the City Secretary, they are sworn to support, protect and defend not only the Constitution and laws of the United States, but also the Constitution and laws of the State of Texas and to faithfully discharge their duties thereunder.

23.

These defendants deny the averments contained in Paragraph 23 of Plaintiffs' First Amended Complaint to the effect that plaintiffs Stone, Ellis and Henderson "have been aggrieved and will be aggrieved by the attacked Texas provisions and Fort Worth City Charter provisions." These defendants further aver that they are without knowledge or information sufficient to form a belief as to the truth of the aver-

ments to the effect that such plaintiffs "voted for (in favor of) Proposition Number II," since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter. These defendants further deny that such plaintiffs have been discriminated against in any manner by these defendants, nor have these defendants deprived such plaintiffs of any of their rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution.

24.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 24 of Plaintiffs' First Amended Complaint to the effect that

> "Plaintiffs Pat Crowley and Marjorie M. Watson, as rendering property owners, voted for (in favor of) Proposition Number II ***.",

since how or in what manner such persons may or may not have voted is a matter of secrecy and known only to the individual voter. These defendants further deny that they have discriminated in any manner against such plaintiffs or have deprived them of any of their rights, privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States.

25.

These defendants deny the averments contained in Paragraphs 25 and 26 of Plaintiffs' First Amended Complaint.

26.

By way of further answer, if such be necessary, these defendants would show that it is a matter of compelling necessity in general obligation bond capital improvement financing that all property, real, personal or mixed, be rendered and placed on the tax rolls of the City of Fort Worth. In this connection the Court will recall that Proposition No. II hereinabove referred to in Paragraph 17 of this answer asks the voters if the City Council of the City of Fort Worth should be authorized to issue its negotiable coupon bonds in the principal sum of $6,860,000 for the purpose of making permanent city improvements by constructing, building, improving and equipping buildings for the public library system of the City of Fort Worth, and further asks the voters to authorize the "levy (of) a sufficient tax to pay the interest on said bonds and create a sinking fund sufficient to redeem said bonds at the maturity thereof."

This Court must also keep in mind that Article 7145 of the Revised Civil Statutes of the State of Texas provides that

> "*All property, real, personal or mixed,* *** is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7145 was adopted by the Legislature pursuant to the provisions of Article 8, Section 1, of the Constitution of the State of Texas, which provides in part:

> "***All property in this State, whether owned

by natural persons or corporations, other than municipal, shall be taxed in proportion to its value***."

Article 7152 of the Revised Civil Statutes speaks to the manner in which all property shall be listed or rendered and provides as follows:

"Art. 7152. How rendered

All property shall be listed or rendered in the manner following:

(1) By the owner. Every person of full age and sound mind, being a resident of this State, shall list all of his real estate, moneys, credits, bonds or stock of joint stock or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties, and all other property.

(2) As agent. He shall also list all lands or other real estate, moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person, company, or corporation, whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

(3) Minor. The property of a minor child shall be listed by his guardian, or by the person having such property in charge.

(4) Separate property of married person. The separate property of each spouse shall be rendered by the owner thereof, but the husband or wife of the owner may act as agent of the owner in such rendition.

(5) Idiot. The property of any idiot or lunatic, by the person having charge of such property.

(6) Cestui que trust. The property of a person for whose benefit it is held in trust by the trustee of the estate; of a deceased person, by the executor or administrator.

(7) Receivers. The property of corporations whose assets are in the hands of receivers, by such receivers.

(8) Corporations. The property of a body politic or corporate, by the president or proper agent or officer thereof.

(9) Copartnership. The property of a firm or company, by a partner or agent thereof.

(10) Manufactories. The property of manufacturers and others in the hands of an agent, by such agent, in the name of his principal, as real, personal and merchandise."

Under Article 8, Section 1, of the Constitution of the State of Texas it is required that

"Taxation shall be equal and uniform."

As a matter of law, to permit a wilful non-renderer to impose a tax lien on a renderer's property without being required to assume a commensurate burden himself would be, in effect, to deprive the renderer of property without due process of law.

Further, these defendants would show that the principal of and interest on general obligation tax-supported bonds issued by the City of Fort Worth are and will be paid solely from the proceeds derived from taxes levied, assessed and collected from persons

who own real, personal or mixed property. The requirement of rendition and disclosure of property for purposes of ad valorem taxation is of the utmost importance, is a compelling necessity for an effective system of tax assessment and collection, and is inextricably related to the creation of, payment and discharge of tax bond obligations.

In this connection these defendants would show the Court that the assessed valuation of real (including improvements), personal and mixed property in the City of Fort Worth for the fiscal year 1971-72 is $1,444,024,440. Of such assessed valuation, real property constitutes $1,077,271,500, and personal and mixed property amounts to $366,752,940.

For the year ending September 30, 1971, the City of Fort Worth derived $18,205,947.35 in taxes from real property rendered and placed on the assessment rolls and $6,198,138.73 from personal and mixed property rendered and placed on the assessment rolls. More than one-fourth of the total funds derived from taxation in the City of Fort Worth was derived from the taxation of personal and mixed property in said City.

For the fiscal year 1971-72, from the funds derived from such taxation, there will be required to be made for principal and interest payments on general obligation tax bonds outstanding the sum of $7,364,524, which bonds are owned and held by bona fide purchasers, for value, throughout not only the entire United States but the world.

The requirement of rendition of property, personal

and mixed, tangible and intangible, as a prerequisite to vote in a general obligation bond election is a matter of compelling necessity by reason of the plain and simple fact that no property is more susceptible of concealment than is personal and mixed tangible and intangible property.

As of December 31, 1971, the outstanding unpaid general obligation tax bond indebtedness of the City of Fort Worth was $92,852,000. Attached hereto and expressly incorporated herein, marked for purposes of identification as "Defendant City Exhibit A," is a true and correct copy of a summation of the assessed values and taxes derived and to be derived from taxable property within the City of Fort Worth rendered for the year 1971. Also attached hereto and expressly incorporated herein, marked for purposes of identification as "Defendant City Exhibit B," is a true and correct copy of an instrument designated "Informal Report to City Council Members, No. 1978," dated October 1, 1971, which shows, among other things, the debt service requirements for the payment of principal and interest due and owing on outstanding general obligation bonds during the fiscal year 1971-72 in the amount of $7,364,524. This sum the City Council of the City of Fort Worth must provide to meet its outstanding general obligation bond payments during the fiscal year 1971-72. A simple mathematical computation reveals that conservatively in excess of $1,840,000 of such $7,364,524 must be obtained from taxes derived from the rendition of personal and mixed property in the City of Fort Worth.

Also attached hereto and expressly incorporated herein for all purposes incident to this proceeding, marked for purposes of identification as "Defendant City Exhibit C," is a true and correct copy of the outstanding bonded indebtedness of the City of Fort Worth as of December 31, 1971.

WHEREFORE, premises considered, these defendants pray that plaintiffs take nothing by their suit, that this Court abstain from entertaining jurisdiction herein, that same be dismissed and held for naught, and that they go hence with their costs without day, and for such other and further relief, special and general, in law and in equity, to which they may show themselves justly entitled.

/s/ S. G. Johndroe, Jr.
S. G. JOHNDROE, JR.
City Attorney
Attorney for the Defendants,
R. M. STOVALL, MAYOR; S. G. JOHNDROE, JR., CITY ATTORNEY;
ROY A. BATEMAN, CITY SECRETARY;
LEONARD E. BRISCOE, TAYLOR GANDY, JESS M. JOHNSTON, JR., W. S. KEMBLE, JR., JOHN J. O'NEILL, TED C. PETERS, PAT REECE AND MRS. MARGRET RIMMER, COUNCIL MEMBERS; AND THE CITY OF FORT WORTH, A MUNICIPAL CORPORATION
1000 Throckmorton Street
Fort Worth, Texas 76102

THE STATE OF TEXAS
COUNTY OF TARRANT

BEFORE ME, the undersigned authority, on this day personally appeared M. C. Matson, known to me to be a credible person, who, after being by me first duly sworn, on oath deposed and said:

My name is M. C. Matson. I am Director of Finance of the City of Fort Worth. I have read the above and foregoing Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary; Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a municipal corporation. I have personal knowledge of the matters of fact therein stated; same are true and correct; and I am competent to testify thereto.

/s/ M. C. Matson

SUBSCRIBED AND SWORN TO before me by the said M. C. Matson this 5th day of May, 1972, to certify which, witness my hand and seal of office.

/s/ Nancy Gateley
Notary Public in and for
Tarrant County, Texas

[S E A L]

A copy of the above and foregoing Original Answer of Defendants, R. M. Stovall, Mayor; S. G. Johndroe, Jr., City Attorney; Roy A. Bateman, City Secretary;

Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John J. O'Neill, Ted C. Peters, Pat Reece and Mrs. Margret Rimmer, Council Members; and the City of Fort Worth, a Municipal Corporation, has been furnished to plaintiffs by depositing same in the United States mail, postage prepaid, addressed to Don Gladden and Marvin Collins, 702 Burk Burnett Building, Fort Worth, Texas 76102, the attorneys of record for plaintiffs.

(Exhibits omitted)

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CIVIL NO. 4,1975

MICHAEL L. STONE, ET AL, PLAINTIFFS

VS.

THE CITY OF FORT WORTH, ET AL,

DEFENDANTS

(1) Requesting Judge: Honorable Leo Brewster
Northern District of Texas

(2) District Judge: Honorable Halbert O. Woodward
Northern District of Texas

(3) Circuit Judge: Honorable Homer Thornberry

(4) Date of Order: May 5, 1972

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied,

as to whether this is properly a case for a three-Ju
rather than a one-Judge court. This is a matter
determined by the three-Judge Court as this ena
a simultaneous appeal to the Court of Appeals and
the Supreme Court without the delay, awkwardn
and administrative insufficiency of a proceeding
way of mandamus from either the Court of Appea
the Supreme Court, or both, directed against the Chi
Judge of the Circuit, the presiding District Judge, o
both. The parties will be afforded the opportunity
brief and argue all such questions before the thre
Judge panel either preliminarily or on the trial
the merits, or otherwise, as that Court thinks a
propriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-89

KATHLEEN CARTER, ET AL, Petitioners

v.

CITY OF FORT WORTH, ET AL, Respondents

PETITIONERS' REPLY TO

RESPONDENTS' SUPPLEMENTAL REPLY BRIEF

The Respondents have heretofore filed a Supplemental Reply Brief to the Petition for Writ of Certiorari. This Supplemental Reply Brief was purportedly filed under the authority of Rule 24 of the Rules of the Supreme Court.

The only portion of Rule 24 which has

any applicability to supplemental briefs is section 5, which provides as follows:

> 5. Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

It is respectfully submitted that none of the contents of Respondents' Supplemental Reply Brief complies with the requirement of the rule that the matter contained therein not be available at the time of Respondents' last filing. In fact, the entire contents of Respondents' Reply Brief relates to a suit which was filed on the 17th day of April, 1972, some ninety-one

days before even the Petition for Certiorari was filed in this case.

PRAYER

Petitioners respectfully ask this Court to disregard Respondents' Supplemental Reply Brief.

Respectfully submitted,

DON GLADDEN
702 Burk Burnett Building
Fort Worth, Texas
Counsel for Petitioners

September 25, 1972